No. 12299

United States
Court of Appeals
For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
Appellants,

vs.

LEO LEBENBAUM,
Appellee.

LEO LEBENBAUM,
Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,
Appellees.

Transcript of Record

In Two Volumes

Volume II

Pages 341 to 489

**Appeals from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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**Appeals from the United States District Court,
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

In the United States District Court for the Southern District of California, Central Division
No. 3752-W—Civil

UNITED STATES OF AMERICA,
Plaintiff,

vs.

21 ACRES OF LAND, etc., et al,
Defendants,

Honorable Jacob Weinberger, Judge presiding.

APPEARANCES

HILL, MORGAN & FARRER by
STANLEY S. BURRILL, ESQ.,
For the Defendants Gawzner.

PAUL R. COTE and
THOMAS H. HEARN, ESQ.,
For the Defendant Leo Lebenbaum.

AGREED STATEMENT AS TO RECORD OF TESTIMONY

It is stipulated by and between appellants, Paul Gawzner and Irene Gawzner and appellant Leo Lebenbaum, through their respective counsel of record, that the following narrative statements and verbatim excerpts taken from the official reporter's transcripts of the proceedings of January 17, February 28, March 18, 19, 20 and 21, April 25, May 12, June 6, August 14 and October 22, all in 1947, and the proceedings of January 23, 1948, may be deemed to be all of the record of the testimony in this cause upon all of the issues presented by their respective appeals and that the same may be printed in lieu of portions of the above described transcripts of the record as their joint designation of the portion of the record of the testimony to be relied upon by them in such appeals.

PAUL R. COTE,
By /s/ PAUL R. COTE,
Attorney for defendant and cross appellant Leo Lebenbaum.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,
Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner. [1*]

Be It Remembered that this cause as to the distribution of the award fixed by the Judgment of

* Page numbering appearing at bottom of page of original certified Transcript of Record.

November 26, 1946, came on regularly for trial on the eighteenth day of March 1947, before the Honorable Jacob Weinberger, Judge of said Court, Hill, Morgan & Farrer, by Stanley S. Burrill, Esq., appearing as attorneys for the defendants Paul Gawzner and Irene Gawzner and Paul Cote and Thomas H. Hearn, by Thomas H. Hearn, Esq., appearing as attorneys for the defendant Leo Lebenbaum:

Whereupon the following proceedings were had and testimony, oral and documentary, was offered by the respective parties and admitted by the Court:

MOTION TO FILE ANSWER TO THIRD AMENDED COMPLAINT AND CROSS-COMPLAINT

By Mr. Burrill:

If your Honor please, at this time, if I may proceed, I move leave of the court to file, on behalf of the defendants and cross-complainants Paul Gawzner and Irene Gawzner, their answer to the third amended complaint and a cross-complaint, a copy of which has heretofore been served upon counsel for the defendant Lebenbaum and also upon the government. The motion is made upon the same grounds as the motion was made to place the cause off calendar, to wit, that the matter is not at issue between the cross-defendants Paul Gawzner and Irene Gawzner and Leo Lebenbaum. [2]

The Court: The record discloses that you are both in court as answering defendants to the complaint of the plaintiff.

Mr. Burrill: That is correct, if your Honor

please. And at this time I am asking leave of the court to file an answer, on behalf of the defendants Paul Gawzner and Irene Gawzner, to the third amended complaint of the government and for leave to file a cross-complaint against the defendant Lebenbaum.

That motion is made, if your Honor please, upon two bases; first, that the case is not at issue between any of the conflicting claims of the defendants Gawzner and the defendant Lebenbaum, and for the second reason that our procedure is controlled by State procedure in a condemnation proceeding, and it has been held by the appellate courts of the State of California that the proper procedure to follow in a condemnation action, where there are conflicting claims between defendants named in an eminent domain proceeding, is to answer the complaint and file a cross-complaint against the opposing defendant to raise the issues between them.

The cases have held that a cross-complaint against the condemning body was not a proper action; that all issues against the condemning body should be raised by an answer but that the issues between defendants in a condemnation proceeding should be raised by cross-complaint between those defendants.

(Argument by Mr. Burrill and discussion between Court and counsel omitted.)

The Court: What are your views, Mr. Hearn?

Mr. Hearn: If your Honor please, the defendant Lebenbaum opposes the filing of the proposed cross-complaint on the ground that the matter con-

tained in the proposed cross-complaint is not proper matter for a cross-complaint in a condemnation action in federal court for the following reasons, first, the proposed cross-complaint sets up only matters occurring since the government surrendered possession of the condemned property to the defendant Lebenbaum, pursuant to an order of this court.

(Argument by Mr. Hearn omitted.)

Second, that the proposed cross-complaint does not state facts sufficient to constitute a cause of action against the defendant Lebenbaum, which I will elaborate on in just a moment; and, third, that the cross-complaint shows on its face the pendency of two other actions which will determine the matters set forth in the cross-complaint, one of the actions being between these two defendants, in other words, the unlawful detainer action. And if for no other reason than that it discloses on its face another action pending, the cross-complaint is improper because the determination of the matters set forth in the cross-complaint must wait the determination of those other actions. [4]

(Argument by Mr. Hearn and discussion between Mr. Hearn and the Court omitted. Mr. Burrill's argument in reply omitted.)

The Court: In view of the fact that counsel for Lebenbaum has made no objection to the filing of the amended answer or, rather, the answer to the third amended complaint, that answer may be filed.

Now, I am just questioning the propriety of some

of the provisions of your cross-complaint. I don't think we should look to labels, or call it what you will, so long as the issues are framed and are before the court.

Mr. Burrill: I agree with your Honor and the cases so hold, that what you label it is no criterion.

The Court: I think your answer sets up your position that you have maintained throughout this litigation and that you are going to continue to maintain until the matter is finally settled, and you are within your rights to maintain those matters that you think are proper in your particular situation. But we now come to a situation that calls for a halt, as it were. We have two dates here that are significant and I don't think we should go beyond those dates. They were mentioned by Mr. Hearn this morning, and I think he was correct in that contention. One is the date of the fixing of the just compensation and the other was the date of the restoration costs. I think that is correct, is it not, Mr. Hearn, that those were the particular dates; that one [5] was in—I don't remember exactly the time but in 1946. The first date was in June some time, wasn't it?

Mr. Hearn: June 1st, your Honor.

The Court: And the last time is the time of the judgment and stipulation. Matters that have occurred since that time I don't think are properly before the court. So I don't think the court is called upon to go into speculative matters as to the anticipated results of litigation arising between these

people subsequent to those dates, for failure to comply with some other agreement, with which this court is not concerned and has not been concerned, which was made subsequent to the issues which are presented here. I don't think we are concerned with that matter. I think we should confine ourselves to the issues as made up and as advocated all of this time by both of these litigants prior to the last date, which is the date of judgment.

Mr. Burrill: May I call your Honor's attention to the fact that the agreement of July 23, 1946, was, of course, prior to the date of judgment by some months?

The Court: That may have been but that has to do with some other matters that were not involved in that condemnation proceeding.

Mr. Burrill: I can't agree with that but that is your Honor's ruling.

The Court: What are your views in that respect? Is that involved in the condemnation proceeding and within the [6] issues proper as defined prior to the alleged breach or prior even to the cause of action and that agreement?

Mr. Burrill: If your Honor please, there are two ways in which that is material. In the first place, it is material as between the parties to show that the acceptance of rent, subsequent to June 1, 1946, was not a waiver of that contention previously made by the defendants Gawzner in the case that the lease was cancelled.

The Court: You are not foreclosed from asserting that stand and that position.

Mr. Burrill: I must have the agreement to support it. Otherwise, if the evidence shows we have accepted rent subsequent to June 1, 1946, without the agreement, we would, necessarily, have had to waive our point that the lease was cancelled by the filing of the eminent domain proceeding. It is a very material point to us there and that was the reason for the agreement, if your Honor please, because at that time and when that agreement was fixed the defendant Lebenbaum was in possession of the premises and had tendered rent. The rent was returned to him and refused.

The Court: That happened some time before also, that is to say, at the earlier stages of this proceeding you contended that there was no lease; that it had been terminated?

Mr. Burrill: Yes; that is correct, and I am still contending it. [7]

The Court: And you took the position then there was no relationship between you folks as landlord and tenant?

Mr. Burrill: That is correct.

The Court: Then, why go into other matters between you folks that had to do with some other contract?

Mr. Burrill: If your Honor please, the reason for it is this, that, as a matter of law, had the defendants Gawzner accepted rent from the defendant Lebenbaum after he went into possession on June 1, 1946, they would, necessarily, have had to recognize their lease and would have waived the contention,

that they had heretofore made, that the lease was cancelled by the institution of the condemnation proceedings. Accordingly, they refused to accept the rent and advised the defendant Lebenbaum that, in their opinion, he was not lawfully in possession and that he would be held liable as a trespasser if they were successful in that contention, and, upon the basis of that dispute, the agreement of July 23, 1946, was entered into by and between the parties, and it provides for the acceptance of rent subsequent to June 1, 1946, and saves to the defendants Gawzner all rights they might contend for. It permits the defendant Lebenbaum to occupy the premises subsequent to June 1, 1946, and saves to him all of the rights he might maintain in this action.

The Court: Yes; but Lebenbaum went into possession as a result of an order of this court. [8]

Mr. Burrill: That is true, your Honor, but that was an order made prior to trial, in the nature of a pre-trial order, which legally is subject to your Honor's changing it.

The Court: Yes. And you are still asserting that situation in the trial and that the issues as made up in your answer and your position all the way along are that you are going to continue that assertion?

Mr. Burrill: Yes, your Honor.

The Court: And then the court will consider everything that is necessary to be considered in connection with that matter and other matters. But I am of the opinion now that we should not com-

plicate the issues by these other matters that I have mentioned, and this subsequent agreement is one of them. I am of that opinion at the moment.

Mr. Burrill: The materiality of it is what I have pointed out in the first place, and, secondly, the second materiality of it is that by that agreement the defendant Lebenbaum again obligated himself to comply with the terms of the lease, and that he has failed to do so, forgetting now the OPA situation; that he has failed to do so insofar as the restoration is concerned, and, having failed to do so in spite of his obligation, he is not entitled to share in the cost of restoration at least in excess of whatever he may have expended up to the time.

The Court: However, that issue you have submitted to the Superior Court in Santa Barbara. [9]

Mr. Burrill: No, your Honor. That is not the issue that has been submitted to the court in Santa Barbara. The issue that has been submitted to the court in Santa Barbara is the issue of the violation by virtue of the OPA overcharge. I think I am correct in that, am I not, Mr. Hearn? There have been so many things happen that it is difficult to remember but my recollection is that the case in Santa Barbara and the claim of violation there is dependent solely upon the alleged violation of the OPA regulations.

Mr. Hearn: I believe that is correct; that that is the only violation of the lease that is complained of.

The Court: I think I have expressed myself. I

may change my mind but that is my opinion for the moment.

Mr. Burrill: Very well, your Honor. And I will ask this only as a matter of record, if your Honor please. Do I understand there is a denial of the motion to file what is designated as a cross-complaint in full or——

The Court: In part.

Mr. Burrill: ——as to those things that occurred subsequent to November 26, 1946, which is the date of the entry of judgment?

The Court: I think that is the general idea. I can't remember every one of these paragraphs. It is impossible.

Mr. Burrill: I realize that and there are certain interblending paragraphs—— [10]

The Court: For example, in the counterclaim you have paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22. I think those matters probably should be stricken. And Paragraphs 23, 24, 25, 26 and 27, are merely conclusions of law. I don't know that it does any harm to leave them there. They may remain. With the exception of those that I have suggested, beginning with Paragraph 7 and Paragraph 22, the others may remain and be considered as part of the answer, as part of your presentation in this case. And also, I believe, that the motion of Lebenbaum that his answer to the second amended complaint stand as the answer to the third amended complaint——

Mr. Burrill: That that is granted, your Honor?

The Court: That is granted. Now, that defines the issues.

Mr. Burrill: May I have an exception noted?

The Court: An exception may be noted. I stated that those paragraphs that remain will remain as a part of the answer. I think I stated that. That will be the ruling. If you will take your pleadings and let us go over these paragraphs together, you will see just exactly what remains in the pleadings.

Paragraphs 1, 2 and 3 may stand. Paragraph 4 is a matter that occurred subsequent to June 1, 1946, and may be stricken. Paragraph 5 the same.

Mr. Burrill: May I interrupt, your Honor? I just noticed that you said that it was subsequent to June 1, 1946, and I merely wanted to call your Honor's attention again to the fact that you had previously referred to the date of judgment and those allegations refer to a time prior to the date of judgment.

The Court: That is included within the provisions of your answer.

Mr. Burrill: I don't so conceive it, your Honor, so that there will be no misunderstanding.

The Court: What acts do you claim under that paragraph as having occurred, that have put you in that position, under Paragraph 4?

Mr. Burrill: Paragraphs 4 and 5, if your Honor please, must be read together, of course, because Paragraph 5 is the one that refers to the execution of the agreement. Paragraph 4 is purely preliminary to Paragraph 5.

The Court: What agreement is that?

Mr. Burrill: This agreement of July 23, 1946.

The Court: In reference to that agreement, they may be stricken, paragraphs 4 and 5. Paragraph 6 has to do with a retail liquor license, which I imagine was covered by that agreement also, and is not within the issues of this case from my point of view. That may be stricken. Paragraph 7 the same ruling. Paragraph 8 may be stricken. Paragraph 9 the same ruling, and Paragraph 10 the same ruling, and 11, [12] 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22. Paragraph 23 is a conclusion of law but that may remain. I think you have asserted that in your answer. Paragraph 24 is also a conclusion of law. Paragraph 25 may remain. It is also a conclusion of law. Paragraph 26 is also to the same effect and Paragraph 27 covered by the judgment, but it doesn't do any harm. These last paragraphs don't do any particular harm. There is nothing in the nature of a cross-complaint in these paragraphs so they may be considered as a part of the answer. So you have nothing left in the way of a cross-complaint. That is the effect of it.

Mr. Burrill: May we note an exception, just for the record?

The Court: Yes.

The Clerk: Shall I mark the document "Filed"?

The Court: It may be filed.

The Court: I don't know that I want to announce any ruling except my entire ruling at the conclusion of this case. The ruling heretofore made, of course, stands unless it is reversed, or, rather,

unless some other ruling is made. You may introduce your lease and present your case from the standpoint of your theory and then, when the case is completed, I will make my ruling.

You may proceed with the introduction of your evidence. [13]

Thereupon defendants Gawzner introduced and there were received in evidence defendants Gawzner's Exhibits 1 (Lease) and 2 (Notice of Termination of Lease). It being stipulated that copies might be introduced in lieu of the originals. It was further stipulated that the original of Exhibit 2 was served upon the defendant Lebenbaum and received by him on or about August 11, 1944.

It was further stipulated that the defendants Paul Gawzner and Irene Gawzner are the owners of the property described in plaintiff's third amended complaint.

Mr. Burrill: Then, if your Honor please, at this time I would like to move the court, with your Honor's permission, that the court make an order directing payment of all of the funds on deposit in the registry of the court to the defendants Gawzner, the basis of that motion being, first, that the institution of the condemnation proceeding with which we are here involved and the giving of the notice, which is defendants Gawzners' Exhibit 2, operated as a cancellation of the lease between the defendants Gawzner and the defendant Lebenbaum and, therefore, that the defendant Lebenbaum's in-

terest in the property terminated upon the expiration of the date specified in the notice.

In that connection, I would like to call your Honor's attention to Paragraph 10 of the lease, which is defendants Gawzners' Exhibit 1 in evidence, and call your Honor's attention to the fact that, under this taking, more than 50 per [14] cent of the rentable rooms were acquired, and that the option rested upon either party, not merely upon the landlord, but either upon the landlord or the lessee, to give the notice terminating the lease. Mr. Hearn, I think, was in error on that.

Mr. Hearn: Yes; either party may give the notice but, of course, Lebenbaum didn't elect to give a notice.

Mr. Burrill: Now, if your Honor please, in connection with that, I want to dispute Mr. Hearn's position in that connection. What the California statute holds is that the value is fixed as of the date of the issuance of summons, not the party to whom the compensation shall be paid. That is ordinarily fixed as of the date of the entry of the interlocutory judgment in condemnation. I merely point that out because he asked for the second ground of my motion, to order the payment of all of the funds on deposit to the defendants Gawzner, under Paragraph 10 of the lease, regardless of the cancellation of the lease; that the award in condemnation proceedings is payable to the lessor. Those points have both been argued before your Honor before. I realize that your Honor definitely has ruled on a

pre-trial ruling as to one of those points. I do not recall whether or not now, if your Honor please, there has been a ruling on the second point, namely, that, regardless of the cancellation, the language of Paragraph 10 requires the money to be paid in a condemnation case to the lessors, who are the defendants Gawzner. And, if [26] your Honor desires to hear further argument on that, I am, of course, prepared to argue it; but I see no reason why I should reiterate arguments that have heretofore been made, unless your Honor desires them.

The Court: The motion is denied.

Mr. Burrill: An exception, please.

The Court: It may be noted.

* * *

Wednesday, March 19, 1947, 11:45 a.m.

(Same appearances.)

Mr. Burrill: If it please the court, we are now in a position where we can stipulate to the restoration item and, accordingly, I offer the following stipulation:

It is stipulated that the portion of the award made by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296.

Do you so stipulate, Mr. Hearn?

Mr. Hearn: So stipulated.

Mr. Burrill: If your Honor would like the approval of the clients, they are both in court.

The Court: You gentlemen are authorized in their behalf to make the stipulation.

Mr. Burrill: Mr. Gawzner, do you approve this stipulation that I have just stated? [27]

The Defendant Paul Gawzner: Yes, sir.

Mr. Burrill: And do you, Mr. Lebenbaum?

The Defendant Lebenbaum: Yes, sir.

The Court: Mrs. Gawzner is a party, too.

Mr. Burrill: Yes; I am sorry. Mrs. Gawzner, do you also approve this stipulation?

The Defendant Mrs. Irene Gawzner: Yes, sir; I do.

The Court: Having arrived at this juncture, I am wondering if you can define that amount.

Mr. Burrill: Yes, your Honor; I can state to you the respective amounts upon which agreements were reached by specified items and am prepared to state here at the present time. Will your Honor permit us to sit at the table and to go over these items?

The Court: Yes; you may sit together. How long a list is this that you have?

Mr. Burrill: It is about a page and a half.

The Court: Don't you think it is better to file a written memorandum of those items?

Mr. Burrill: We can do whatever your Honor wishes. We can read them off into the record so that they will be a part of the record or, of course, go back to the office and prepare them, but I imagine we can do it about as rapidly in the record

and probably more so than to return to our office and do it that way.

The Court: Yes; you may do that and then you may supplant [28] that probably with a list that can be easily resorted to when the time comes.

Mr. Hearn: Mr. Reporter, I am going to suggest that, as each item is read off, you hesitate a moment before putting it down because we may wish to change the notation as to what is included in the item. It might make for a more correct record that way.

Mr. Burrill: If the court please, the item of $91,296, just referred to and just stipulated to, is made up as follows—and, as I read these items off, they are agreed to, Mr. Hearn?

Mr. Hearn: Yes.

Mr. Burrill: Unless we specifically modify them?

Mr. Hearn: Unless we modify them.

Mr. Burrill: Lawns, gardens and trees $ 1,650.00
Roads and walks 725.00
Recreational facilities 550.65
Main building, which includes the exterior and interior but does not include carpeting or furniture or fixtures 6,500.00
Cottages and casitas, less the item of roof repairs but including the restoration of both exterior and interior, but not including carpets or furnishings 13,000.00
Garage and miscellaneous buildings, including storage shed, pump house, engineer's shop, gardener's tool house, storage building and linen building.... 364.00

Mechanical equipment, which is the repair of the heating system in certain cottages, casitas and the main building....	600.00
Water heaters, to repair and replace.....	3,000.00
Refrigeration, which includes the refrigerators in the kitchen and the refrigerators in the cottages where there are refrigerators, to repair	900.00
The plumbing and water system, which includes the repair of taps, the repair of toilets, the repair of the well pump and the booster pump in the irrigation system	2,000.00
The sewer system, which is the cost of cleaning the sewers and septic tanks and connecting the grease trap	2,500.00
To repair the incinerator.....	246.00
Replace garden tools and power lawn mower	710.00

Now, if your Honor please, that might be classified as the physical property. And the total of those items is $32,745.65.

The next set of figures, if your Honor please, might be classified as personal property and they are made up of the following items:

Carpets and rugs, to replace	$7,500.00
Carpets and rugs, to be cleaned	1,644.20
Draperies and curtains, to replace	1,495.00
Draperies, to clean	1,073.25

The next is the item of furniture and fixtures and consists of many items.

The Court: I am just wondering now, if this

will take a little while longer, if it shouldn't be deferred until after the noon hour?

Mr. Hearn: Yes, your Honor; it will take at least 20 minutes more.

The Court: I think we will defer this matter until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock p.m. of the same date.)

Wednesday, March 19, 1947, 2:00 P.M.

(Same appearances.)

The Court: You may proceed.

Mr. Burrill: Taking up where we left off, your Honor, the next item, under the furniture and fixtures, is andirons, that is,

To replace two sets	$ 30.00
To refinish 26 sets	52.00
Total	$ 82.00
The next item is beach furniture,	
to refinish and repair	$1,000.00
Waste baskets, to replace	100.00
Benches, to refinish	22.00
Beds, to repair	766.00
To replace missing beds	230.00
Bed bases, to replace	125.00
Buffet and dining room set, to refinish	75.00
Venetian blinds, to replace	75.00
Chairs, to refinish	1,619.50
Chair, to upholster	6,136.00
Chairs, cleaning	740.00
Chairs, to replace	1,170.00

The Court: Are those broken chairs or what?

Mr. Burrill: Broken or lost or something. They were missing, in other words.

The next item is chests, to refinish	$ 48.00
Chest, to replace, missing	77.00
Chaise lounge, to refinish and clean	90.00
Chiffoniers, to paint	532.00
Commodes, to repaint and refinish	154.00
Couches, to refinish and reupholster and clean	500.00
Davenport, to refinish and repair, reupholster and clean	250.00
Davenport, to replace, missing	150.00
Desks, to refinish	690.00
Desk, to replace, missing	45.00
Dressers, to refinish	916.00
Dresser, to replace, missing	200.00
Fire extinguishers, to replace	45.00
Fireside sets, to refinish	80.00
Fireside sets, to replace	350.00
Flag, to replace	12.00
Lamps, to repair and refinish and new shades	863.50
Lamps, to replace, missing	155.00
Love seats, to refinish and upholster	385.00
Mattresses, to refinish, retie, recover, sterilize and replace missing	$3,500.00

The Court: Have you that segregated?

Mr. Burrill: To replace would be $350. The repairing and re-tying and re-covering would be $3,150.

Mirrors, missing	$ 30.00

Piano, to refinish and install new keys.... 175.00
Settees, to refinish, reupholster and clean.. 830.00
Window shades, new, that is, to replace, missing and torn ones..... 250.00
Sofas, to refinish, reupholster and clean.... 685.00
The next is bed springs, to repair, rehabilitate, sterilize, and replace missing ones.. 3,630.00

The Court: Is that segregated?

Mr. Burrill: Maybe we can do so, if your Honor please. Just a moment. The repairing would be $3,333 and the replacement of missing springs, $297.

Night stands, to refinish.....$ 189.00
To replace, missing..... 60.00

Or a total of .....$ 249.00
Kitchen stools and other stools, to refinish.$ 60.00
The next is tables, to refinish..... 1,500.00
Tables, to replace, missing..... 700.00
The next is engineer's supplies, missing... 1,000.00
Glassware and crockery, to replace..... 7,274.25
Linens, to replace..... 9,271.65

Those are all of the items, if your Honor please.

The Court: The total of that is $91,296, is it?

Mr. Burrill: It should be, your Honor; yes, sir.

Mr. Hearn, I don't know whether our stipulation on the record covers it, but you agree, do you not, that the figures which I have read off are correct and are the stipulated items?

Mr. Hearn: So stipulated.

Mr. Burrill: There is one other small item that I think was overlooked yesterday, if your Honor please, in connection with our various motions and

the receipt of answers, that I thought to complete the record might be made, and that is that the record show an acknowledgment of service by myself, on behalf of the defendants Gawzner, of the answer to the third amended complaint as permitted to be filed by Mr. Hearn upon the substitution of his answer to the second amended complaint; and I assume that Mr. Hearn will acknowledge service after the filing of my answer to the third [34] amended complaint.

Mr. Hearn: Yes, your Honor; I do acknowledge it.

Mr. Burrill: In other words, just to show in the record that we are both aware of and have received copies of our various pleadings that were permitted to be filed by your Honor.

The Court: It may be noted.

Mr. Burrill: If your Honor please, the situation being as it now stands, with the figures agreed upon for the cost of restoration, it appears to me that the next main problem to be determined is the problem of fixing the rental value and that we should proceed to fix that.

The Court: Of this award, what is the situation with reference to the balance of the money? Is it the entire amount of the award less this stipulated amount of $91,296? Is that the balance remaining of the award, or what is that situation?

Mr. Burrill: Yes; the total award, if your Honor please, was $205,000. Is that correct, Mr. Hearn?

Mr. Hearn: The total award was $205,000; yes.

But I will want to differ with you as to what should be the next order of procedure.

Mr. Burrill: I was only answering his Honor's question.

The Court: That includes the moneys that have been paid, does it, the $205,000? [35]

Mr. Burrill: Yes, your Honor. The $205,000 was the total award. Of that $205,000, there has been a small portion drawn down for the payment of taxes at one time. I can find that amount out if your Honor wants it.

The Court: I don't think it is necessary now.

Mr. Burrill: And then there was also deducted from that amount the sum of $1672.23 which was treated as payable to Mr. Lebenbaum. My understanding in connection with that is that it arose by virtue of Mr. Lebenbaum retaining possession for five days, I believe, of a portion of the premises after the government went in, and was some sort of an agreement between them whereby Mr. Lebenbaum was to receive certain moneys and the government was to receive certain other moneys. And, instead of having been paid in cash, it was deducted out of the award and the judgment recites that fact.

The Court: That is part of the $205,000?

Mr. Burrill: That is part of the $205,000.

Mr. Hearn: I believe it also includes the purchase of some supplies by Mr. Lebenbaum from the government.

Mr. Burrill: It may. I don't know what the details of that are. All I know is it was raised and

not repaid in cash, and the government insisted that the amount be deducted from the $205,000 they put up in court as judgment to be apportioned for the use and occupation of the premises, including that portion of it that was under lease to Mr. Lebenbaum and [36] the portion of the property taken by the government that was outside of that area.

EDWARD H. ALLEN

called as a witness on behalf of the defendants Gawzner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Burrell:

I reside in Los Angeles and have resided here for 59 years. My business and occupation is that of an appraiser. I have followed that occupation for 33 years. My experience in that connection has been as follows:

I had done some appraising, that is, probate court appraising, previous to 1914. In the year 1914, I was appointed a regular probate court appraiser in Los Angeles County, and I received approximately 35 appointments per month in that work to appraise all of the assets of the estate, both real and personal property. That consisted of both large and small estates and during that time I appraised between five and six thousand estates and property located all over the State of California. I continued in that work as a regular probate court apraiser for

(Testimony of Edward H. Allen.)

fourteen years, until 1928. The original appointment was by Judge James C. Rives, who was the probate court judge in this County at that time. The appraisals at that time included all classes of real estate [37] which any person left in his estate, and consisted of farms, agricultural land, residential property, business property and industrial property, of every nature and description, scattered all over Southern California.

In addition to probate court appraisal experience I have had other appraisal experience. In 1923 or 1924, I was appointed or employed by the Board of Supervisors of this County to appraise a strip of land through the Malibu Ranch, a strip 100 feet wide and 20 miles long, north of Santa Monica to the Ventura County line; that is what we now know as Roosevelt Highway. And for seven years thereafter I was employed by and appraising properties for the Board of Supervisors, that is, for highway construction, flood control purposes, dams and property scattered throughout the County.

Following 1928 I have been doing general appraising. I was employed by the State Board of Equalization as an appraiser in this city for a period of eight years. Each two years I had to appraise between 250 and 300 parcels of property here in the City of Los Angeles. It was all types of property. It was used for checking against the Assessor's assessments to determine the relationship and value between industrial property and com-

(Testimony of Edward H. Allen.)

mercial property, residential property, and so on. In that work I appraised one of the four corners, each two years, on Spring, Broadway and Hill Streets from First Street to Tenth Street, and one property in the middle of the block. The other properties were properties scattered [38] around, real estate owned by the public utilities, that is, the gas companies, electric companies and railroad companies, to compare with the assessed values of property as compared to their valuation by the State Board of Equalization.

I have done appraising for the State Corporation Commissioner of the State of California and the State Superintendent of Banks and have done appraising for insurance companies. At the time of the street opening and widening program that we had here in the city, starting about 1929, I was employed by the City in appraising the properties and measuring the damage done to the property remaining, in the opening and widening program here in the city, of such streets as Olympic Boulevard, Pico Street, Wilshire Boulevard, Florence Avenue and Washington Street and various other streets.

In 1933 or 1934, when the property on which is now located the Union Depot in this city—there were 33 acres there—belonged to the Southern Pacific Railway Company, the Union Pacific and Santa Fe condemned a two-thirds interest in it and I was employed by those two railroads to appraise that

(Testimony of Edward H. Allen.)

property and testified in court in the case; and, after that, I was employed by the Southern Pacific, Union Pacific, and Santa Fe to appraise the property that was acquired for the approach to the depot, extending from Macy Street north to Alhambra Road. In the probate court proceedings I was appointed as one of the appraisers in the Henry [39] Huntington Estate, who died in 1927, and he had 2500 parcels of real estate, which I appraised, together with all of his personal property, that is, stocks and bonds and things of that kind. In 1934, I was employed by the Treasury Department of the government to appraise some 900 parcels of that Huntington Estate property for the government, and since that time I have appraised hundreds of parcels and thousands of acres of land for the Treasury Department of the government. That was in connection with matters where taxes were being litigated; estate taxes and things of that kind.

I have been employed by the Attorney General of the United States as an appraiser, by the District Attorney for the Southern District of California in the federal courts and I have been employed by trust companies and insurance companies and banks in appraising properties of all natures and descriptions scattered throughout Southern California. On many occasions I have been appointed by various courts, both the Superior and Federal, to act as appraiser, that is, in appraising property where

(Testimony of Edward H. Allen.)

the valuation question arose. In all these instances, or in the major instances, I was employed to find the market value and to appraise the market value of the property that was involved.

I have had experience in appraising hotel properties. I have been appraising properties for the past thirty years, you might say, throughout Southern California. Within the past two years I was appointed by Judge Robinson of the [40] Superior Court of San Francisco to appraise the assets of the Pacific States Building and Loan Association here in Southern California, and I appraised in that work fifteen, or eighteen, or twenty apartment houses and hotels within the past year. There were other properties other than hotels which I appraised. I was appointed to appraise commercial properties here in the City of Los Angeles and in San Diego, Glendale, Pasadena, Long Beach and Santa Monica; then I had ranches to appraise and industrial property and also residential property.

I have had experience in valuing leasehold interests. I was employed in connection with the valuation of the Bullock's store leasehold matter. I have been appraising leasehold interests for 25 or 30 years, especially in appraising estates where the deceased had a lease on property and probably it was an asset of his estate or maybe a liability. I have been employed in these leases here in the city of Los Angeles where there are 99-year leases or 49-year leases, where the lease provides that each

(Testimony of Edward H. Allen.)

five years or each 10 years a committee of three arbitrators be appointed to arrive at the value of it for the next five or 10 years, and in that work I have appraised properties on Broadway and Spring Streets and Hill Street here in the city, and have appraised properties scattered throughout the city with long-term leases on them. On many occasions in connection with estate appraisals I had to determine the valuation of a lease where the decedent owned [41] the real property that was encumbered by a lease to ascertain whether or not a leasehold had a market value over and above the rental being paid thereunder.

I have had experience in connection with hotels. I own a hotel located at Balboa, Newport Harbor, in Orange County. That is what we might classify as a seaside area. By that I mean, Balboa is on the ocean and on the bay too. It is on Newport Harbor and the property I own is generally classified as a resort hotel. I have owned the ground since 1922 or 1923 and I have owned the hotel since 1934. I don't have it leased. I actually operate it through a manager.

I have appraised the Alexandria Hotel in this city, the Ambassador Hotel and the Rosslyn Hotels at Fifth and Main Streets, and the Kip Hotel on Sixth Street and the Monarch Hotel at Fifth and Figueroa and many smaller hotels, that is, hotels from 50 up to 200 and 300 rooms scattered throughout Southern California. I was employed as an

(Testimony of Edward H. Allen.)

appraiser on the Norconian Hotel near Corona and appraised all of the property, the equipment, furniture, improvements and so on. I was employed by the owners of the Shangri-La Hotel in Santa Monica within the past two years. I was appointed by the court to appraise the Grand Hotel in Santa Monica. Those two latter hotels were taken over by the government. I appraised the Miramar Hotel in Santa Monica, which was also taken over by the government. I appraised the Biltmore Hotel in Montecito, which was taken over by the government. I also appraised [42] the Mar Monte Hotel in Santa Barbara, which was taken by the government. I also appraised the Barbara Hotel in Santa Barbara. I appraised the Huntington Hotel in Pasadena and, as I said, many smaller hotels throughout Southern California.

I was also employed to appraise the value of the use of the Miramar Hotel in Santa Barbara, the property that is involved here. The Biltmore Hotel in Montecito is only about three-quarters of a mile or a mile from the property in question here. And the Mar Monte Hotel is within the city limits of Santa Barbara and about two miles from the Biltmore Hotel and three miles from the property in question. In addition to valuations of real properties themselves, I have appraised leasehold interest as such and the market value of such leasehold interests.

I have examined the property involved in this

(Testimony of Edward H. Allen.)

case, which is designated the Miramar Hotel. I have known the Miramar Hotel for 25 or 30 years but I first saw it from an appraisal standpoint around the first of June 1944. I was there when the Army was taking possession of the property. I examined the property at that time and I have examined the property on several occasions since that time. I have maps of the property. I have examined the exterior and the interior of the buildings. I have studied the financial report made by Horwath & Horwath covering the occupancy of the premises involved during the period of time that Mr. Lebenbaum was in the premises prior to June 10, 1944. I have also [43] seen the report made by Horwath & Horwath during the period of time Mr. Lebenbaum has occupied the premises from June 1, 1946 to December 31, 1946. I have seen the lease that was executed between Mr. and Mrs. Gawzner, as lessors, and Mr. Lebenbaum, as lessee, being the lease introduced in evidence in this case as defendants Gawzners' Exhibit 1. I am familiar with the entire area that is involved that was taken by the government and I am familiar with the portion of that entire area that is covered by the lease.

(A map of the area involved, which had been previously marked upon a pre-trial hearing as the Court's Exhibit No. 1 was admitted in evidence and marked as defendants Gawzners' Exhibit No. 3.)

(Witness continuing.)

Referring to the map, defendants Gawzners' Ex-

(Testimony of Edward H. Allen.)

hibit No. 3, all of the property outlined with a blue pencil in all particulars on the map includes all of the Gawzners' holdings. That property on the map that is outlined with a green pencil, as for instance, up in the north or left hand corner, enclosed in green, is Gawzners' property that was not included in the hotel lease, and on the right hand side of the map also is an area, enclosed in green marking or hatching, that was not included in the hotel lease, and in the center of the map, near the bottom, is also some property, two slivers of land, which were not in the hotel lease. Referring to the first area marked in green that I pointed out in [44] the upper left hand corner of the map would be the northwest corner of the property, that is, at the area along the State Highway and Eucalyptus Lane. That area that is outlined in green is not included in the lease. Then on the upper right hand corner of the map is an area outlined in green which includes the garage property and certain other area. That is excluded from the lease. In the lower right hand corner is an area along the ocean front lying easterly of the wharf or boardwalk also outlined in green. That is excluded from the area covered by the lease. At the top portion of the map is an area outlined in red. That is originally the Gawzners' holdings to the northerly red line, but the property between the red line and the blue line was sold to the State of California for highway purposes. That property was, however, actually in use and occupied

(Testimony of Edward H. Allen.)

by Mr. Lebenbaum prior to July 10, 1944, and was used by the Government during the entire period they were in possession. The property is still used by the hotel. That has not been improved or occupied by the State Highway Commission as yet.

Q. (By Mr. Burrill): Mr. Allen, for the purpose of the next question, will you please assume, first, that the lease, of December 15, 1943, Defendants Gawzners' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect and that Mr. Lebenbaum was occupying the premises; second, that Mr. Lebenbaum had the right to assign or sublet the premises for a period from July 10, 1944, to [45] June 1, 1946, or that the lessors would consent to such an assignment or subletting; third, that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination of the occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of such restoration; that the premises were to be continued to be used as a hotel and that the assignee or sublessee would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944 to June 1, 1946. Upon those assumptions, what, in your opinion, was the market value of the lessee's interest in that lease? In other words, what, in your opinion, would a will-

(Testimony of Edward H. Allen.)

ing purchaser have paid to a willing seller for the right to sublet or become the assignee of the premises involved for the period of July 10, 1944, to June 1, 1946?

Mr. Hearn: Please don't answer yet, Mr. Allen.

If your Honor please, I object to any answer to that question on the ground that the matter is irrelevant and immaterial to any of the issues in this case. And I would like to be heard on that, if I may, because it seems to me this question goes right to the very heart of this lawsuit.

> (Argument of counsel and discussion between court and counsel omitted except the following concessions made by Mr. Hearn during the course of the argument (Tr. p. 128): [46]
>
> "We are before your Honor to settle the question of the apportionment of this award as between these two contesting defendants, and I am treating Mr. and Mrs. Gawzner, of course, as being one defendant. It is true, without question, that Mr. Gawzner is entitled to recover the rental value of that portion of the condemned property which lies outside the boundaries of the Miramar Hotel. We don't dispute that.")

The Court: I am going to make this observation. This is a vital issue in the case, of course——

Mr. Hearn: I so regard it, your Honor.

The Court: ——and it has been all during the

(Testimony of Edward H. Allen.)

litigation. I am just wondering if this evidence should not be permitted to go in subject to your objections, and the right to renew your objections later on, with a motion to strike the evidence, in the event of a ruling in your favor.

Mr. Hearn: Well, your Honor, that might save some time. It is true I feel that I am rather compelled to present my objections and my reasons for them at this time.

The Court: I will permit you to do that. I make this observation with the further view that, in the event this evidence is excluded upon the case going to a higher court, which apparently it appears it might go, by either side by being dissatisfied with the decision, everything will be before the appellate court on both sides and you won't have to come back for a retrial on any particular issue. I don't know whether I should consider that phase of the situation or [47] not but often cases, where there is evidence excluded, when they go up to an appellate court, are sent back for retrial. That would obviate the necessity of sending it back for retrial and the matter could be presented——

Mr. Hearn: Yes, your Honor; that probably would be a wise thing to do, to receive the evidence subject to our motion to strike.

The Court: That is what I have in mind. I am not making any ruling at this time on the merits of the motion or the objections.

(Testimony of Edward H. Allen.)

Mr. Hearn: I ask leave to be heard just a little further on the subject.

The Court: Yes; you may proceed with the balance of your argument.

(Further argument of counsel omitted.)

The Court: As I indicated before, I shall let the evidence go in subject to your objection and your renewal of the objection later on and a motion to strike.

Mr. Hearn: Yes, your Honor.

The Court: So the ruling will be reserved under those conditions.

Q. (By Mr. Burrill): Mr. Allen, do you recall the question that was put to you?

The Witness: Yes, sir. In my opinion, the lease had no bonus value or market value as of July 10, 1944, the date when the government took over. Had no market value or [48] bonus value, either one.

Mr. Burrill: Will you please state your reasons for that answer you have given?

Mr. Hearn: The same objection, your Honor, as I have made heretofore.

The Court: Yes; the same ruling.

(The witness continuing.)

My reasons for the answer given are based upon a study of the lease and based upon an investigation that has extended over the past three or four years as to the terms and conditions of hotel leases, that is, what percentage of the gross income the lessee binds himself to pay or what percentage of

(Testimony of Edward H. Allen.)

the net profit he binds himself to pay. In this particular instance, I don't know of and have never heard of a lease paying 35 per cent of the gross income for room sales plus 3 per cent as a so-called breakage fund or something of that kind. I have known of no hotel lease and have never ascertained of one with as high a percentage of rent as this lease contains. Another reason is that the improvements upon the property itself, which is approximately 12½ acres in ground—the youngest and latest structure built upon the property was approximately 35 years of age and the others as high as up to 60 years of age, and they require a great deal of repair and reconditioning and so on to take care of them. The living quarters through the property are in cottages that are scattered almost an equal distance over say eight or nine [49] acres of the property. The extra cost in labor of taking care of those cottages and maids going back and forth is greater than if it was all in one place in a hotel, and the cost of maintaining the grounds thereon was an obligation that isn't ordinarily found in a hotel lease. And the provision in the lease for restoration of the property in a condition such as it was as of the date of the signing of the lease is an obligation that someone would have to assume if they purchased the lease for the unexpired term. And, also, my opinion is based upon my experience through the years of appraising hotel properties and especially in the last three or four years the investigation of hotel leases in general and

(Testimony of Edward H. Allen.)

statements as to profits made from the operation of hotels. I might say I am a member of the American Hotel Association and the Southern California Hotel Association and I have received all of the bulletins from those associations as to hotels, hotel leases and the profits through the years. And it is my considered judgment and opinion that the lessee, Mr. Lebenbaum, would have been unable to have received any sum of money for the transfer of the lease to another party.

The Court: Let me see; you inquired about a transfer of the lease for a portion of the time, did you not?

Mr. Burrill: Yes, your Honor.

The Court: Do I understand this witness to analyze that lease on the basis of a transfer of the entire term?

Mr. Burrill: I will inquire. [50]

Q. Mr. Allen, the statement which you have given to me was in response to a question for a transfer of the lease for a portion of the term. Are the reasons that you have given to cover a portion only or the entire time?

A. A portion only. That is 22 months and 20 days. I understood that was in the question.

Q. That is correct; it was in the question.

In any one of these hotels that you have listed, was there a single one where the basic rent on the rooms was as high as 35 per cent?

A. No; I have never heard of 35 per cent of room sales. I have heard of liquor beverage sales of

(Testimony of Edward H. Allen.)

15 per cent. Food sales generally run 5 per cent, or I think they start at 2 per cent. I don't recall a lease where the food sales went any higher than 7½ per cent, and I have seen leases where the liquor and food combined were 7½ per cent. I have examined leases and obtained information where the rental required under a percentage lease was less than the amounts that I have just referred to but, as I have stated, I have never heard of a lease calling for 35 or 38 per cent of the gross room sales. It is not an usual requirement in a lease upon hotel premises that the lessee shall place the premises and maintain the premises in the same condition as he obtained them on the date of the execution of the lease. This is the first lease I ever heard of that had that. The ordinary lease provides to maintain it in the same condition in [51] which it was taken, except for ordinary wear and tear. I have never heard of a hotel lease that called for restoration.

Q. Do you consider that a burden upon the lessee over and above what is usually called for by hotel leases?

A. In my opinion, it is a burden that the lessee just couldn't meet, as demonstrated in this particular case and from the investigation I made of all of these hotels that I was appraising for Army occupation. Experienced hotel men were all of the opinion that the Army use and wear was just twice what it would have been if it had been civilians in the property. In other words, the damage done by

(Testimony of Edward H. Allen.)

the Army in two and a half years would have been done by civilians in say five and a half years or more. And for a lessee to obligate himself to put that property back and restore it is just prohibitive.

Q. You also mentioned the breakage fund of 3 per cent that is called for by this lease. Is that, in your opinion, an added burden upon the lessee, keeping in mind that the lease requires, as I have stated, that 3 per cent of the income from rooms and beverages shall be placed into a separate fund for restoration, up to $3,000 per year?

A. Well, it is just additional rent, is all that amounts to. Some of the leases have a provision of say 2 per cent of the gross income of a hotel that shall be spent for advertising of that hotel or something of the kind, but this breakage [52] fund and so on—the tenant has already obligated himself to keep the buildings in repair and replace broken articles and so on. If it is in the lease also, this is just 3 per cent additional and really, instead of 35 per cent of the gross, it is 38 per cent.

Q. Are you familiar with the terms of the lease in reference to that breakage fund that that is to be used for replacements in connection with the premises? A. Yes, sir.

Q. Are there any other reasons that you have, Mr. Allen, that you have not heretofore given us?

A. I don't recall any at the present time.

Mr. Burrill: You may cross-examine.

(Testimony of Edward H. Allen.)

Mr. Hearn: There will be no cross-examination, your Honor, but I would like to reserve the right, at the beginning of our next session, to make motions to strike certain portions of the testimony, including a motion to strike on the grounds heretofore stated in objecting to testimony as to the bonus value.

The Court: You say there is not cross-examination?

Mr. Hearn: No cross-examination.

(Thereupon evidence was taken as to the area outside of the lease.)

(Witness continuing.)

I have an opinion as to the market value of the right to use and occupy the portions of the property owned by Mr. [53] Gawzner that are sought to be condemned by the government in this case, that is, outside of the area covered by the lease for the period of time from July 10, 1944, to June 1, 1946, said market value being fixed as of July 10, 1944. In my opinion it is the sum of $10,950 for the period of 22⅔ months. In my opinion the two areas, Eucalyptus Lane and the beach, were of practically the same value per front foot. In my opinion the fair rental of the garage as of July 10, 1944, the date of taking was $200 per month.

My figures for the garage only included what interest Mr. Gawzner had in this property. The Army occupied all of it, except for some storage

(Testimony of Edward H. Allen.)

in the lower portion. It is built on a hillside. The garage floor is level and under the rear end or south end of it there is a storage space, which is just a dirt floor with the roof unfinished. The rental value that I have given of $200 a month is for the upper portion only and I have not included the lower portion.

The Court: Do you wish to cross-examine as to this?

Mr. Hearn: Yes; I would like to ask a few questions.

Cross-Examination

By Mr. Hearn:

I do not know of my own personal knowledge of any leases or rentings of any similar garage in that vicinity or neighborhood at about the same period of time. The closest garage that I know of in rental is away up in Montecito. That is the only garage on the highway there for nearly two miles. I took [54] into account the provision of Paragraph 8 of the lease in computing the rental valuation. I said I fixed the rental value of Mr. Gawzner's rights. I considered Mr. Gawzner's rights to be that at any time he had the right of improving the garage and using it for some other purpose; that any time he desired to do that, he had that right subject to no other obligation other than set forth there, except that he couldn't put anything in there to compete with the hotel, for instance, any food stuff or beverages. I considered the fact that Mr.

(Testimony of Edward H. Allen.)

Lebenbaum had the right to occupy the basement of the garage after Mr. Gawzner might put the upper portion to some such use. They used it for the storage of fire wood, and I considered that Mr. Gawzner could lease the upper floor or the main floor of the garage. The floor area is approximately 50x120 feet. I considered the fact that Mr. Lebenbaum had the right to use the basement for the storage of wood or for general purposes. They were storing wood and broken down furniture and stuff of that kind in it at the time. It is my recollection of the provision that that right continued after Mr. Gawzner might put the ground floor to some other use and I considered it in fixing my rental value.

The other portion of the outside property and by the term "outside property" is meant the portion of the property condemned which lay outside of the boundaries of the Miramar Hotel lease and were both vacant parcels of property, I [55] didn't break it down at a capitalization of any total value of the property. When I was appraising the property, I made an investigation of the sales and so on along the highway and along the beach and I determined in my own mind that the highway frontage was worth around $100 to $150 per front foot and that the beach frontage was approximately of the same value. I figured there was 220 feet of frontage on the highway and 400 feet on the ocean. I think the reasonable market value of that prop-

(Testimony of Edward H. Allen.)

erty at that time was $100 or $125 a front foot. There are 620 feet altogether and at $100 a foot that would be $62,000. There were offers made for property there and, when Mr. Gawzner sold a piece of property on Eucalyptus Lane, it would tend to establish a value of the highway frontage of $125 to $150 a front foot. The price paid by the State Highway Commission—of course, there was an angle in it of severance damage—the State Highway Commission paid $32,200 for 2.65 acres. That sale was made in July 1942. That represented around 800 feet of frontage along the State highway. I got my information from Mr. Gawzner and the judgment in the case. I saw a copy of it or I saw the correspondence between the Highway Commission and so on. I did not arrive at my valuation by the award in that case. That wasn't must of a criterion, that property, taking a long strip of that type. There was some severance damage mixed up in it and it wasn't much of a criterion to arrive at value. The best evidence we had there [56] was the beach frontage, on offers that were made for it, and the opinion of real estate brokers in the area. I do not have any personal knowledge of those offers. They were reported to me by real estate brokers and people familiar with it. The information as to the offers made for the beach frontage owned by Mr. Gawzner did not come to me from Mr. Gawzner himself. That came from a real estate broker in Santa Barbara. There were two

(Testimony of Edward H. Allen.)

offers, one of $150 a foot and another over, next to the house there, of $200 a foot. The offers were made about 1942 or 1943, I forget just the date now. They were made during the war. The use that was contemplated by those offers was for residential purposes. There are houses down there on the ocean and one of these lots was that last cottage that has been built there on the beach. The frontage that I say is worth $100 a foot is of varying depths but extends from the ocean back to the railroad right of way, as shown on defendants Gawzners' Exhibit No. 3.

Mr. Burrill: No redirect examination.

CHARLES G. FRISBIE

called as a witness on behalf of the defendants Gawzner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Burrill:

I reside at 1865 Campus Road in the City of Los Angeles. I have resided in Los Angeles for the past twenty-five years. My business and occupation is that of a civil engineer and [57] appraiser. I have followed the profession of civil engineering and appraising about thirty-five years. I commenced my appraisal work in California about 1912 and have continuously followed my activity of civil engineering and appraising since that time. In 1912 and 1913 my activities principally took place in San Diego and then from 1914 up to about 1917

(Testimony of Charles G. Frisbie.)

in Imperial Valley. I have been located in Los Angeles ever since.

In the last 25 years, I have appraised for a good many organizations. I have made appraisals for the City of Los Angeles, where they were taking properties for the widening of streets, for parks, playgrounds, and all kinds of public purposes, and in that connection have had to appraise every kind of property. I have appraised many, many hotels that were being taken. I have appraised the value of the property as a whole and the value of any leaseholds that existed on them, and made many appraisals, for some time past, for Los Angeles County.

I appraised properties for the City of Los Angeles over a period of about 10 years and it involved several thousand different properties. That was primarily street widening proceedings and acquisitions for all kinds of other purposes, for park purposes and for viaducts and for playgrounds and for schools and innumerable other public purposes. Some of the major street opening proceedings in which I appraised properties were Flower Street in the downtown area, from [58] Seventh Street to out where it joins Figueroa Street; Olive Street between the same points; Figueroa Street; South Broadway, Second Street on out to where it joins Figueroa and then Figueroa Street out to where it joins Pasadena Avenue, Third Street, Eighth Street and Tenth Street, all of them several miles long. They involved hotel properties. Many hotels were

(Testimony of Charles G. Frisbie.)

scattered all through those projects. I appraised those properties to find the market value. I appraised the leasehold interest where there was a leasehold interest in those properties. During that same period of time I was making appraisals for Los Angeles County for the same purpose for many or other street openings and their acquisitions for parks and playgrounds and other public uses. I also was making appraisals for the City of Glendale and the City of Huntington Park and the City of Phoenix, Arizona, and various other cities and public bodies for a period of about 20 years. That would cover the period up to 1935. Subsequent to that time I have made appraisals for private corporations and private individuals for the same purposes. I have made appraisals for the State Corporation Commissioner in connection with bond issues or loans and appraised in that connection the Blackstone Hotel at Long Beach. I made appraisals for the State Insurance Commissioner and in that connection I appraised the Riviera Apartment and Hotel in Long Beach. That is a height-limit hotel. The Riviera is right on the edge of the ocean, that is, a part of it is up [59] on the bluff and a portion of it goes down to the beach level. The Blackstone is just back of the beach, just at the bluff line, in Long Beach. I have appraised the Ritz Hotel in Los Angeles. That is a height-limit hotel that is at Eighth and Flower. I appraised the Ambassador Hotel on Wilshire Boulevard and I appraised five or six hotels and apartments from four to eight or

(Testimony of Charles G. Frisbie.)

nine stories high along Wilshire Boulevard for tax purposes. I have appraised the Biltmore Hotel and the Mar Monte in the City of Santa Barbara. Those appraisals were made in connection with the acquisition of the use of those hotels by the United States Government. I appraised the Union Station site here in Los Angeles where the Union Station is now located. I appraised the property for the Southern Pacific Railroad that they owned that was involved in that proceeding and I have appraised a good many other properties that were in private ownership that were required for ingress to the Union Station site. I appraised the Times Building at First and Broadway, now a portion of the Civic Center. That is the old Times Building. I appraised the Klinker Building right across the street from the Times. I am now in the process of appraising two or three hotel properties on Broadway. In general that covers the experience I have had in the appraisal of properties. I have appraised many other properties but haven't enumerated them because they did not have anything to do with hotel valuations. At the present time I am engaged in the appraisal of Owens Lake for [60] the State of California. There are many appraisals of that kind that don't have anything to do with hotel values.

About two-thirds of my work for the past 25 years has been valuation work and includes all types of property. I have appraised beach frontage property; I appraised something over 600 feet of beach

(Testimony of Charles G. Frisbie.)

frontage just north of Santa Monica for Alonzo Bell, who owned the property at that time. That property was between the Roosevelt Highway and the ocean just north of Santa Monica. It would be similar in character to what we have been referring to as the beach land owned by Mr. Gawzner but not as desirable because you can't build in through that particular area between the highway and the beach. The physical characteristics were generally the same. I have appraised some frontage about ten miles to the southeast of Ventura along the coast. I have appraised frontage in Malibu in the Malibu Colony that is beach lot or beach frontage property. I have appraised scattered properties in Venice, in Santa Monica, Ocean Park, Long Beach and all of those towns.

I first became acquainted with the Miramar Hotel around 1937 and have been generally familiar with it since that time. I commenced my work in connection with this particular case the early part of 1946. I have been upon the grounds of the Miramar Hotel property. I was on the grounds in 1937. Went over the property at that time and I have been on the grounds two or three different times at intervals since then up to [61] 1946. I was on the grounds in 1946 again. I examined the area that is involved in this litigation and the buildings that are constructed thereon. I have examined the lease, defendants Gawzners' Exhibit No. 1. I have had available to me and examined the reports of Messrs.

(Testimony of Charles G. Frisbie.)

Horwath & Horwath, accountants, covering the period of time Mr. Lebenbaum was in possession of the premises from January 1, 1944 to July 10, 1944. I have also had available and examined the report of the Miramar Hotel for the period from June 1, 1946, to December 31, 1946 prepared by the same accountants. In addition to examining the records of this particular hotel I examined the lease provisions of quite a large number of other hotels. I made that examination to see how the provisions of those other leases compared with the provisions of this particular lease and I had to examine other leases and be familiar with other leases to know whether or not this particular lease would have a bonus value or have a market value. I have information as to the rental provisions of those other leases. There were about ten or twelve of them. I was familiar with a number of others which I didn't think were comparable at all. I have had to examine a good many different leases as of about this particular period. I have examined other hotels and have checked on the income of other hotels and have examined the cost accounting, the profits, the costs and the income on various other hotels. I have seen the map of the area that is involved, being [62] defendants Gawzners' Exhibit No. 3, and am familiar with the colored pencil markings on that map.

Q. (By Mr. Burrill): Mr. Frisbie, for the purpose of the next question, I wish you would assume

(Testimony of Charles G. Frisbie.)

the following facts, that the lease of December 15, 1943, defendants Gawzners' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect, and that the tenant was occupying the premises; that the tenant had the right to assign or sublet the premises for a period from July 10, 1944, to June 1, 1946, or that the lessors would consent to such assignment or subletting; that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination of his occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of restoring the premises to their condition as of July 10, 1944; that the premises were to be continued to be used as a hotel and that the assignee or sublessee or occupant would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944, to June 1, 1946, as I have heretofore stated. Now, upon the assumption of those facts what, in your opinion, would be the market value of the lessee's interest in said lease for that period of time? In other words, what, in your opinion, would a willing purchaser have paid to a willing seller for [63] the right to sublet or become the assignee of the lease or the right to occupy the premises involved for the period of from July 10, 1944, to June 1, 1946?

(Testimony of Charles G. Frisbie.)

Mr. Hearn: Just a moment, please. To which the defendant Lebenbaum objects, if your Honor please, upon the ground that the question calls for an answer which is irrelevant and immaterial to any of the issues in this case, and for the reasons stated in the objection made to the same question, or practically the same question, asked of the witness Allen, on the same grounds, that is to say, that the question of bonus value is irrelevant.

The Court: I will make the same ruling as was made to the other question put to the other appraiser, and you have the same rights as then expressed.

Mr. Hearn: Yes, your Honor.

The Court: I will reserve the ruling on the objection. I will permit the evidence to go in subject to the right of Lebenbaum to move to strike. That is the same ruling that was made in relation to the other question.

The Witness: I am of the opinion that there is no market value on that lease and no bonus value. I mean for a lease to have value, market value, that it has to have a bonus value above the terms of the lease itself. My reasons are that in the examination of quite a number of different hotel leases I have not found one that called for as high a rental as a whole as this particular lease. The terms of every one [64] of those hotel leases were on a lower basis as a whole, figuring all of the different elements. I mean by the different elements that there are ordinarily three provisions. There is a percentage

(Testimony of Charles G. Frisbie.)

on the room sales and the percentage on the food and the percentage on the beverages and, considering all of those things, and particularly the rental based on room sales, it is the highest lease that I happen to have any knowledge of. Another thing, this particular property is the cottage type, with large grounds, and, under the terms of the lease, the tenant has to maintain the grounds. The cost of operation of property like that is greater than one that is all concentrated in one building. The lease calls for maintenance of the property, with no provision for normal wear and tear, that most leases do provide for, and that is quite an item and expense of operation. So, considering everything, the terms of this lease compared to the terms of all the different leases I happen to know of, I have come to the conclusion there was no bonus value in the lease and, therefore, no market value.

By "market value" I mean that it couldn't be sold to somebody for money on the particular date in question for the particular period in question.

I have an opinion as to the rental value of the premises taken by the government in this case that are outside the area covered by the lease. The government was taking not only the portion covered by the lease to Lebenbaum but also [65] taking the area shown on defendants Gawzners' Exhibit No. 3 bordered in green up in the northwest corner and also over at the east end of the property. They were taking the garage and all of the area outlined

(Testimony of Charles G. Frisbie.)

in green on said Exhibit No. 3. In my opinion the market value of the use and occupancy of the area owned by the defendants Gawzner that was taken by the government outside of the area covered by the lease for the period of July 10, 1944, to June 1, 1946, fixed as of July 10, 1944, was the sum of $10,950. The area in the northwest corner of the property that is excluded from the lease has a frontage of 220 feet on the highway. It is all of the area west or a red line, which I have put on the map at this time. In my opinion that highway frontage has a value of $100 a front foot. The beach frontage, that is excluded from the lease, is approximately 400 feet in length, and in my opinion that has a value of $125 a front foot. That would make a total value for the two parcels at $72,000 and I capitalized that at 5%. I then figured the garage rental at $200 per month. I figured only the main floor of the garage, because in examining the lease I found the tenant had a right to use the basement if he needed it. I have information as to offers made for or acquisitions of those properties and I have information as to sales of other similar areas and I have taken into consideration the difference between the time of those offers and sales as compared to June 1944. [66]

Cross-Examination

By Mr. Hearn:

I think the rental value of the garage during the period from July 10, 1944, to June 1, 1946, was a

(Testimony of Charles G. Frisbie.)

little less than it would have been say in 1946. The garage in 1946 was rented for a little higher price. I have understood that they had an offer or had rented it for a higher price. I would say the present day rental value would be a little higher than in June 1944. I understand that the present rent being paid for the garage property was $250 a month. If I assumed that it was $200 a month that would not change my testimony because there isn't a great deal of difference. When you get up into the last half of 1944 and the year 1945 and then into the first half of 1946 there hasn't been any great change. There might be just a little bit but it would be so small that it would be negligible. The rental value as of July 10, 1944, was very little less than at the present time. I haven't seen any lease on the garage property that covered a period from October 1946 to February 1947. I asked Mr. Gawzner what the rental was on the garage and was informed it was $250 a month. At the time I talked to him, which was two or three months ago, he said the rent he was receiving was $250 a month. If I assumed that the garage was rented sometime during the month of October 1946 until sometime during the month of February 1947 at $150 a month and since that date up to the present time it has been [67] rented at $200 a month, that would not change my testimony as to the rental value of the garage, because there in the Santa Barbara area the peak was reached early in the summer of 1946 and there

(Testimony of Charles G. Frisbie.)

has been some recession in the last six months at Santa Barbara and at San Diego and in all of the coast towns. I would say that rental value was substantially higher in the early part of 1946 than in July of 1944. I am not aware of any sales of leases on hotel properties comparable to the Miramar Hotel in that general area which occurred at any time about or during the period from July 10, 1944, to June 1, 1946. My opinion that the Miramar Hotel lease had no bonus value is not based upon sales of similar leases in the area. It is based upon the terms of the lease itself compared to other leases. It is correct that I arrived at my conclusions by calculating that since the burdens under the Miramar lease are greater than other leases, with which I am familiar, therefore, the Miramar lease has no bonus value. The fact that the tenant of the Miramar Hotel property operated it at a substantial profit after carrying all of the burdens specified by the lease would not change my testimony. I have been familiar with the operation of that property prior to July 10, 1944, and also subsequent to the termination of the government's occupancy so I had knowledge of those factors at the time I came to my conclusion. I knew of the fact that the tenant during the period from December 15, 1943, to July 10, 1944, had made a substantial amount of money and [68] what was being paid to the owner on the lease during that particular time and how that would compare with the total amount

(Testimony of Charles G. Frisbie.)

of money provided here in this settlement.

Q. (By Mr Hearn): Did you take into account the lessee's earnings during that period? I mean net earnings now.

Mr. Burrill: I am going to object to the question of profit from business as immaterial because it is not an element that may be considered in condemnation proceedings.

The Court: Overruled. This is cross-examination.

(Witness continuing.)

Yes; I have seen the financial statements of the earnings of the property during that time. I was also familiar with the fact that under the lease the lessee, Mr. Lebenbaum, had expended the sum of $20,000 for certain changes in the premises. I did not figure that item of expenditure added anything to the bonus value of the lease. I figured that the existence of the obligation to expend that money didn't add anything to the sale value of that lease. I had understood that a substantial part of the $20,000 had been expended during that early period of the lease. I didn't consider that the $20,000, or the portion of it that was spent, was a total loss to the lessee. The expenditure of that money on the property had enabled the tenant to occupy and operate the property and pay the rent and make some profit. There is no question but what he did make profit during [69] that period. The fact that he made a profit does not vary my opinion as to

(Testimony of Charles G. Frisbie.)

whether or not there was any bonus value because in putting a value on a lease you have to compare the terms of that lease with other properties and what you can lease other properties for. Any prospective purchaser of that lease would consider the terms of that lease and then he would compare it with the terms of other leases that he could get; but, unless he thought this was an exceptionally favorable lease, or if he could get another one without paying any bonus, just make a deal direct with an owner, he wouldn't pay a penny on this lease, the only reason being for any bonus on a lease is its very favorable terms because the terms are lower than other leases and there would be nothing by having that particular one.

I am familiar with market conditions on hotel properties. That is, the outright purchase and sale of the properties themselves and the purchase and sale of leases. I am familiar with the market conditions as they prevailed in that area during the period of the government's occupancy. Hotel properties or hotel leases were not readily available. There were not very many available properties. They were scarce. It is a fact that hotel properties reached what might be called a peak during the period from July 10, 1944, up to June 1, 1946. It is a fact that during that period of time hotel properties generally, including the Santa Barbara hotels, were at a very high point for earnings. [70]

(Testimony of Charles G. Frisbie.)

They reached a peak all up and down this coast during that period of time.

Q. (By Mr. Hearn): What, in your opinion, was the reasonable market rental value of the Miramar Hotel property, in its entirety during that period of time?

Mr. Burrill: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

(The witness continuing.)

I figured it was $161,500 for the entire period of 22⅔ months.

The Court: I didn't quite understand your question. The market value of what?

Mr. Hearn: The rental value of the entire hotel property.

The Court: The reasonable market rental value?

Mr. Hearn: Yes, your Honor.

The Court: Is that the gross or the net?

Mr. Hearn: I will ask the witness.

Q. Will you explain your answer, Mr. Frisbie?

A. That, your Honor, is what I thought was the value of the entire property during that period of time from July 10, 1944, up to June 1, 1946, and took into consideration the total rent that might be received by an owner during that period of time and then took into consideration the period of time and then that it was to be paid at the beginning of the period. [71]

The Court: That is, you took that into con-

(Testimony of Charles G. Frisbie.)

sideration not as an operating hotel but as the value of the rental facilities there, is that correct?

A. Yes; and, of course, I took into consideration the fact that it was a very good period of time and that, leading up to that period, there had been a greater occupancy and the room rates were getting higher. I had taken all of those factors into consideration in figuring what I thought was a fair rental value of the entire property during that particular period of time.

Q. (By Mr. Hearn): That is, for a tenant who wanted to take over the rentable and useable facilities that were present, for hotel purposes?

A. Yes, sir. Well, it was figured a little bit higher because of the nature of the use to which it was going to be put.

Q. That is, it was taking into account the use to which the Army was going to put it?

A. Yes.

Mr. Hearn: I believe that is all.

The Court: There is another question I would like to ask and I may want to frame some questions of my own here some time during this proceeding. I haven't your formula as yet. And I may want to ask either this witness or Mr. Allen those questions, or some independent witness. You say that you took into consideration some financial report when you looked [72] into this matter of the operation of this hotel during the previous period of time that has been mentioned here, is that correct?

A. I didn't take it into consideration, your

(Testimony of Charles G. Frisbie.)

Honor, in arriving at my opinion as to the market value of this lease. I knew about it. Your Honor asked me if I was familiar with the fact. I had seen these financial statements of income and expense and net operation, and I did take those into consideration for a period of time, prior to June 10, 1946, in arriving at what I considered the total value of the use of that property would be for that period. But, in arriving at my opinion of the value of the lease itself, its sale value, I took into consideration only a comparison with other existing leases to see whether this lease was very favorable in its terms compared to these other leases. For a lease to have bonus value, it has got to be favorable; it has got to have lower terms than other leases that are available. And those were the things that I took into consideration in arriving at the conclusion that there was no bonus value in the lease itself.

The Court: You use that term "bonus value" the same as you use the term "market value", do you?

A. Not exactly, your Honor. For instance, where a man has a lease say on a hotel, if he is paying say all it is worth—we will imagine five hotels and say four of them are rented at certain terms and he is taking into consideration [73] what would be the fair rental on, we will say, this fifth hotel, and he compares the terms of the lease that is in existence on this fifth hotel with the other four

(Testimony of Charles G. Frisbie.)

hotels, and, if he finds that they are getting it at quite a low percentage and that the terms of this existing lease are quite low compared to the other available leases, then he would say, "That lease has a market value and I can afford to pay something above the ordinary rent." And that additional value in the lease is its bonus value and its reason for having market value.

The Court: Wouldn't a prospective purchaser take into consideration many factors in determining whether it had any such value that you describe?

A. Yes. If he gets away from the lease itself and gets to consider say the business and his own ability to operate a hotel, then he is getting into the business angle rather than the value of the lease itself.

The Court: Wouldn't he, of necessity, get into the operating end of that lease in order to determine whether it would be of any value? Wouldn't he consider that factor?

A. Well, just imagine that there is another lease available and, when he gets to the business angle—or say there are two hotels, both of equal merit and equal as far as making money is concerned. Here is one available on pretty favorable terms and here is another one that is not as favorable. You have to pay a higher rate on it. If he can get this one on pretty favorable terms, he goes and gets the one he can [74] get on the favorable terms. He is getting around to the business angle, assum-

(Testimony of Charles G. Frisbie.)

ing the two hotels are similar and that the opportunities are equal. He is going to take the one that he can get at the lower rate because all of the business opportunities are still there and he figures he won't pay as high rent.

The Court: If he would consider taking the lease on any terms, would he not consider whether or not that hotel had been operated as a hotel, its earnings, and all of those surrounding conditions, the demand for hotel rooms, the prospects of the hotel business in the future and the trend of the hotel business? Wouldn't he take all of those things into consideration?

A. Yes; he would because, if that trend was down and there was no chance to make any money, he, naturally, wouldn't want to take a lease.

The Court: He wouldn't start cold with a hotel that wasn't operating, that had no history of any kind, and consider that hotel on the same basis as a hotel that had been operating and had been making a profit?

A. No. If there were two hotels and one hotel was vacant and had no reputation and the other one was occupied and had a pretty good history back of it, he would take the one that had the history back of it in preference to the one that didn't.

The Court: Did you know in your investigations what the [75] nature of the operations of this hotel were during that period of time that it had been operated by Mr. Lebenbaum, up to the time that possession was taken by the government?

(Testimony of Charles G. Frisbie.)

A. I don't remember offhand; no. Mr. Burrill has the statement here.

The Court: Did you analyze the basis of your answer with that in view or not?

A. Well, in arriving at my conclusion that there was no bonus value in this particular lease, I had knowledge of the operation of that hotel and I also had knowledge of the operation of other hotels and how they compared, and came to the conclusion, because of the very high rate that was called for under the terms of this lease, that, in my opinion, it had no bonus value.

The Court: Do you know whether or not that hotel had been formerly operated, before the government took it over, with all available rooms rented or not?

A. It was getting quite a high occupancy in that half of 1944. It got up, as I remember offhand, to 80 some odd per cent average for that year and, by the time they got up into the summer, it was pretty well occupied, between 90 and 100 per cent by the middle of the summer. But the average for that first half of the year was somewhere around a little over 80 per cent in the winter months, until along in the early summer.

The Court: And it is your opinion, as you stated, that [76] the trend was upward during that period?

A. Yes.

The Court: And it had not reached its peak?

(Testimony of Charles G. Frisbie.)

A. No. By studying operating hotels, I would say they reached their peak along in 1946.

The Court: Did you take into consideration, in addition to the operation of this hotel and the sale or rooms, the sale of food and liquor, when you made your answer? A. Yes; I knew of those.

The Court: Were those factors, as disclosed in this report, that you were familiar with?

Mr. Hearn: I might say, your Honor, we intend to produce the report and the accounting firm that made it and explain it to your Honor.

Mr. Burrill: I might state I will object to the introduction of that on direct testimony as not proper direct examination. I don't want you or the court at this time to rest under any misapprehension, and that is why I made that statement. I appreciate the court is entitled to ask whatever questions his Honor desires to ask.

The Court: This witness presented himself as an expert witness in this particular transaction and I want to find out what factors were considered.

Mr. Burrill: I have made no objections to your Honor's questions but, if I deem the questions are subject to objection, I shall feel perfectly at liberty to make my objections, [77] and your Honor will undoubtedly rule in connection with that.

The Court: You should if you feel you are required to do so.

Mr. Burrill: Yes, your Honor.

The Court: I don't know that I quite under-

(Testimony of Charles G. Frisbie.)

stand you in your testimony. Here is a hotel, according to your own statement, that had been operated at a profit and, from the evidence brought out by Mr. Hearn, some $20,000 had been spent in improvements during that period of time. I don't know what the statement shows but, apparently, the books were closed at the end of that period with a net profit. Assuming that you were a purchaser who knew that fact and you wanted to buy that hotel for that period of time, and assuming, as you say, there was at least 80 per cent occupancy and the trend was upward, you are still of the opinion, are you, that there was no value to that lease, either bonus value or market value, is that correct?

A. Yes.

The Court: In other words, you wouldn't have paid anything for it at all?

A. No, because, suppose there was another hotel available, or, when a man looked around, he was trying to determine whether to buy this lease or whether to lease some other place. He would examine other hotels and he would examine the kind of rentals they had on them. This opinion of mine is predicated entirely on the theory of bonus value on the lease [78] itself. It is not based on the profits that the tenant might be able to make as a business man and in the operation of the hotel. Somebody else might buy his business but the lease itself is what I am talking about, the value of that lease and its market value.

(Testimony of Charles G. Frisbie.)

The Court: The question was put to you, what would a willing purchaser pay to a willing seller, taking into consideration all of these things you have mentioned.

A. If, for instance, in the examination of another hotel, I ascertained that the profits during this particular period were quite a substantial sum, but I found that the rental value was away under that sum of money, it was because that was the business. When the government took over the property, you couldn't make them pay for the business that was on there.

The Court: That in condemnation proceedings apparently is the law but I am trying to arrive at facts here.

A. You have to arrive at the value of the use and occupancy during that period of time which, in my opinion, was substantially less than the profits that might be realized on the property as a whole by the tenant and by the landlord.

The Court: Did you have any method of comparing this lease with other leases in that general vicinity, assuming that you were a willing prospective purchaser?

A. Well, most of the hotels just around there were operated by owners. I do have a number of hotels up and down [79] the coast and do have the terms of those leases, the percentages being paid on the room sales and the percentages being paid on the beverage sales and on the food sales, and I

(Testimony of Charles G. Frisbie.)

did compare those with the terms of the Miramar Hotel and I didn't have any of them that were as high as the terms under the lease on the Miramar.

The Court: The sum and substance of your answer is that, because the terms of this lease were more burdensome on the lessee than other leases you were familiar with, that would not be a desirable lease, is that correct?

A. Yes; and would have no bonus value.

The Court: Notwithstanding the fact that it had earned a net profit in its operation?

A. Yes; that is true because—somebody might buy his business and pay something for it but the lease itself, in my opinion, had no bonus value and no market value.

The Court: Who else but a hotel man would buy that business?

A. Nobody but a hotel man but the hotel man would be buying something other than the lease itself. He would be buying a business. He buys the goodwill. But that was one of the elements, when we were figuring the total sum of money here, that we did not fix as the basis for that total sum that the government was to pay because we had been instructed that the government did not in a condemnation proceeding have to pay for the business, which is the profit you can make in [80] the operation, and that it had to be confined entirely to what is the fair rental value of that property. Then, when you get back to the lease itself, you compare

(Testimony of Charles G. Frisbie.)

that lease with other leases and then whether or not that is a very favorable lease and whether somebody is justified in paying a substantial bonus or the market value for that particular lease. Had I figured on the business angle of this property during that period of time, I would have figured a substantially higher sum of money.

The Court: You understand it is a controversy between two parties; that the government isn't in this controversy now? A. Yes.

The Court: That the government is out, having settled its part of this litigation?

Mr. Burrill: If your Honor please, may I take exception to that remark in this connection? I think it must be assumed that we are here apportioning an award in a condemnation case and that we are confined in the amount of money that is before your Honor to the amount that the government would be required to pay in the condemnation proceeding.

The Court: I won't pursue that line of inquiry. I just made that comment to the witness but I won't pursue any line of inquiry along those lines. The witness apparently seems to be familiar with the rule of law which he thinks prevails in a case of this kind. I was trying to elaborate [81] somewhat along those lines. However, it is not material as far as I am concerned at this time. You said that the prospective purchaser, from your point of view, would consider only the lease, is that correct?

A. The prospective purchaser of the lease itself.

(Testimony of Charles G. Frisbie.)

There might be a prospective purchaser that would want to buy the business, which is something else, and, as I understood the law, we were not to consider the business on this hotel; that, when we were figuring what the government should pay for that particular period, we could take those factors into consideration, but that wasn't the amount the government was to pay.

The Court: In giving your answer, are you construing the law or is it the law that was given to you by someone as a basis for your conclusions or what?

A. Yes; Mr. Burrill has told me what the law is, and I have been instructed in the past on this type of case, where properties were involved in condemnation and where there was an owner and a lessee involved, but, in trying to determine what portion of the award should go to the lessee, that I couldn't consider the profits that the lessee was making in the operation of the business; that I had to consider the rental value of that property and the terms of the lease and its desirability when compared to other leases of a similar nature.

The Court: Are you prepared to answer a question as to [82] the value if the business element were considered? Are you prepared to answer that question in addition to the lease?

A. No; I am not, your Honor. I would have to go into that particular phase more thoroughly in order to answer that.

(Testimony of Charles G. Frisbie.)

The Court: You haven't given that any particular study in connection with this?

A. I have studied it only in this way. I wanted to know whether the occupancy was going up, whether costs of operation were going up. The hotels as a whole up there were getting better rates during that period of time, and all kinds of matters of that kind, I took into consideration in attempting to arrive at what would be the fair rental during that period of time, but I didn't consider the value of the business itself.

The Court: Will you explain to me just what the significance of this figure that you quoted is, $161,500? What does that include?

A. That is considering all of the various elements——

The Court: Will you name those and give me the information as if I had never heard of the matter before?

A. That there were a certain number of rentable rooms there, 135; that the occupancy prior to the taking had been going up; that a study of other hotels that were not taken by the government during that period indicated that they continued to go up and got to their peak in 1946; that this [83] particular lease and other leases indicated that rental was on ordinarily a percentage of the room sales and the beverage sales and the food sales and that, as income went up, ordinarily costs were going down, that is, they wouldn't be as much per dollar

(Testimony of Charles G. Frisbie.)

of income. And then, after studying all of those particular factors in connection with this particular property and the rental terms on other properties that I knew of, and studying the operation of other properties that operated, I finally came to the conclusion that the fair rental value of the entire property for that entire period was $161,500.

The Court: That is to say, the rooms would rent at so much and these other facilities would rent at so much, and the total amount during all of this period would amount to this total figure, is that correct?

A. No; that isn't your Honor. The total figure that would be realized would be far in excess of this $161,500.

The Court: What would this figure represent?

A. That is just what I considered to be the fair rental value during that period of time. Now, the owner or tenant or anybody else would want to make some profit, and you are getting over into the business angle. The only incentive for anybody to occupy a property is to be able to rent it on terms to enable him to make a profit over and above his rent. So this $161,500 is what I would consider the fair rental value. [84]

The Court: To a man operating the hotel?

A. To anyone that would want to take that property over during that period of time. I figured it a little bit high because I figured the use and occupancy to which the government would put that

(Testimony of Charles G. Frisbie.)

was in excess of what it would have as a government operation.

The Court: I still don't understand——

A. I probably don't make myself very clear.

The Court: Perhaps it is my disability. I don't quite understand what you mean by stating that it is the fair rental value. Do you mean the fair rental value in the operation of the hotel as a business?

A. No—well, yes, a fair rental value. But it doesn't mean all of the profit that might be made out of that property. No one would ever pay that amount of rent for the property during that period of time. It does not include the profits that somebody might make by operating the hotel or business there, selling drinks, selling food and selling rooms. It does represent what somebody would be willing to pay in rent for the use of that property during that period of time, and the inducement they would have to pay that kind of rent would be that over and above that they would be able to make a substantial profit, which would be from the operation of their hotel business.

The Court: In other words, they would realize in excess of this amount? [85]

A. Yes; that is right.

The Court: And it may not represent this amount?

A. That is what they would be willing to pay

(Testimony of Charles G. Frisbie.)

in the way of rent for the privilege of having it for that period of time.

The Court: Wouldn't that in fact be during the course of the operation of the hotel?

A. The profit that they can realize would be from the operation of the hotel, like a man rents a store and he pays $10,000 a year for the use of that store, but say he actually makes $25,000 a year from the operation of a clothing business in that store. He would be willing to pay $10,000 a year rent for the property, to have a property of that kind, on a good street, where he could make a good profit in the operation of his business. Suppose you had two stores side by side and one was going to cost him 6 per cent of his gross business and the other 5 per cent, and there were other stores in the neighborhood at 5 per cent. There wouldn't be any bonus value in his lease. So in this $161,500, that is not the profit that could have been made on that property during that period of time, assuming an owner operated it. It is what I thought would be the fair rental value for the right to occupy that property and conduct a business on it, a hotel business, and sell food and liquor.

The Court: That is, that is the amount that you think [86] that a man should pay for the use of that property during that period of time?

A. Yes.

The Court: That is the sum and substance of your testimony?

(Testimony of Charles G. Frisbie.)

A. Yes; that is right, your Honor.

The Court: That is all.

Mr. Hearn: May I ask some questions, please?

The Court: Yes.

Q. (By Mr. Hearn): Mr. Frisbie, do you know of any comparable hotel property in or near Santa Barbara, California, which was available for lease, either by taking a new lease or by a purchase of an existing lease, that was available during the period of the government's occupancy of the Miramar Hotel? A. No; I do not.

Q. Would you say that there were none available?

A. I don't know of any that was available.

Q. You were generally conversant with the hotel market at the time?

A. Yes. I do not know of any that were available.

Q. Now, will you please explain this to me? Will you please tell me, forgetting for a moment this legal distinction and confining yourself to the ordinary business end, how it is possible in this kind of a transaction to separate the lease on a hotel from the business which is being operated [87] in the hotel?

Mr. Burrill: To which we object as incompetent, irrelevant and immaterial. There is no question of the business involved in this litigation. The only thing that the government took was the use and occupancy of the hotel, and the Supreme Court

(Testimony of Charles G. Frisbie.)

of the United States has held that the business and good will and items of that kind cannot be compensated for in a condemnation proceeding, where the taking is for temporary use, any more than they can when the fee is taken. And I cite your Honor United States v. General Motors.

The Court: This is cross-examination and I think counsel should have a wide latitude in examining an expert witness.

Mr. Burrill: I appreciate that it is cross-examination, if your Honor please.

The Court: It may or may not be material but I think wide latitude should be given to cross-examination.

Mr. Burrill: I agree with that, your Honor, that wide latitude is permissible but it doesn't grant the privilege to inquire into immaterial matters and that is the meat of my objection, that he is attempting to insert elements that are not considered in condemnation proceedings.

The Court: The objection is overruled.

Mr. Burrill: An exception, please.

Mr. Hearn: Will you please read the question, Mr. Reporter? [88]

(Question read by reporter.)

A. I think it is entirely possible to separate the two. One represents the value of the use of the property. The other represents the property itself plus a lot of other elements, the skill of the operator, his business ability and a thousand and one

(Testimony of Charles G. Frisbie.)

factors. They demand business ability and business skill to make a profit. One person can take a first-class hotel and have a lease on it and not make a profit, and another man, a very skilled operator, can take it and make a very big profit, and that hotel is the same hotel and it has the same rental value, and the amount of money made out of the operation of it as a business depends on the skill of the man that operates it.

Q. Now, Mr. Appraiser, you, of course, don't mean to say that this element or item that you call the business value is something that could be picked up and carried away from that particular hotel and transplanted to another hotel, do you?

A. No. The buildings of that particular hotel and the setting and location of that particular hotel are all elements that have their effect on the profit that is made in the operation of a business. That is absolutely true. But, when you get over to the business angle of it, you have many things other than just the property itself. An unskilled fellow can take a first-class property and lose money on it. The Biltmore Hotel here in Los Angeles lost money for a long time and Baron Long took it over and made a lot of money on it. In business, you have that personal element of managerial skill and experience and all of those factors, and that is the reason why in condemnation proceedings you can't collect for loss of business.

Q. A prospective purchaser of a lease on a hotel

(Testimony of Charles G. Frisbie.)

would take into account, necessarily, the amount of money that he could make as an operator from the business of operating that hotel under that lease, would he not?

A. That is one of the elements he would think about, yes, and his own skill compared to the existing operator. And there have been instances where people have taken over a hotel, that was showing a loss, because they thought they had sufficient skill and ability to make the things pay.

Q. In other words, in figuring what amount of money they could pay for the lease, they take into account and consider the amount of money they thought, considering their own skill, they could make from the hotel under the lease?

A. No. They would want to have a financial statement of operation of a hotel if they were thinking about taking over a lease, and they would study the records of that hotel and compare the records with what they thought they could accomplish. And there would be two elements. One is what is the fair rental value of this property and what is the business angle of it. More than one person has paid a million dollars for good will in private transactions. And they would [90] consider, first, the lease itself and they would be interested in the history of the property and its trend and all that. Then the next thing is the business. And those two are two entirely separate things.

Q. But, when it came down to buying the lease

(Testimony of Charles G. Frisbie.)

and paying good, hard money for it, they would take both into consideration, wouldn't they?

Mr. Burrill: I object to that upon the ground it takes into consideration elements that are not proper to be considered in a condemnation proceeding, and I object to it upon the ground it is incompetent, irrelevant and immaterial.

The Court: The objection is overruled. I think this is proper cross-examination. He has given the basis upon which his opinions are based and I think this is testing his knowledge on the subject.

Mr. Burrill: An exception, please.

Mr. Hearn: Will you read the question, please, Mr. Reporter?

(Question read by reporter.)

Q. (By Mr. Hearn): By "both" I mean both the rental value of the property and the business part of it.

A. Yes; they would be interested to know what is the past history and what has been accomplished on this property. Has it shown any profits? Has it had a good occupancy? Have they been able to get good rates on the rooms? Those are all factors any buyer of a lease would think about. And then the next step is, is there any bonus value in the lease and he would compare it with other hotels. A private person might say, "There is no bonus value in this lease but I might buy your business," and he might buy it. And say he didn't pay anything for it but he did consider the man had a business he wanted to buy and did buy it.

(Testimony of Charles G. Frisbie.)

Q. But he couldn't buy it separate from the lease, could he?

A. No. There would be two elements he would take into consideration. One is the right to occupy those premises and the other the right to take over the business that is there and, because it was a good business, he would pay something for it.

Q. You don't actually contend in fact, and aside from accounting, that the two are separable, do you?

Mr. Burrill: To which we object as incompetent, irrelevant and immaterial and it is attempting to bring into the case an element that is not compensable in condemnation proceedings and it is speculative and remote.

The Court: Overruled.

Mr. Burrill: An exception, please.

Q. (By Mr. Hearn): Mr. Appraiser, the point I make is that, aside from the process of calculation that may go on in the buyer's mind, as an actual fact and as an actual business operation, the lease and the business of conducting hotels cannot be separated, can they? In other words, let [92] us say this. If a man doesn't own the land or doesn't own the building and he wants to operate a hotel on the property, he has to have a lease to do it with, doesn't he? A. That is right.

Q. And in that sense I mean the two cannot be separated, isn't that true?

Mr. Burrill: We make the same objection.

The Court: The same ruling.

(Testimony of Charles G. Frisbie.)

Mr. Burrill: An exception, please.

A. Well, I think those two elements could be separated. They both would be considered; there is no question about that. Anybody getting a lease would consider the business angle of that property. But the two are separate things. One is the right to the property, which is the lease, and the other is the business angle to it, to make a profit.

Q. Then, can you possibly tell me how he could operate the property if he didn't have a lease?

Mr. Burrill: The same objection.

The Court: Overruled.

Mr. Burrill: An exception, please.

A. He couldn't.

Mr. Hearn: That is all.

Mr. Burrill: No redirect examination.

Mr. Burrill: If the court please, at this time I would like to ask counsel for a stipulation of fact to the effect [93] that the defendants Paul Gawzner and Irene Gawzner have been paid no sum of money or other compensation for the use and occupancy of the premises involved in this litigation, for the period of July 10, 1944, to June 1, 1946, either by the defendant Lebenbaum or the United States government, with one exception only, that there has been withdrawn from the funds on deposit in the registry of the court a sum of money of approximately $1800, as my memory now serves me, which was used for the payment of one installment of taxes.

Mr. Hearn: If your Honor please, I have agreed with counsel that I will so stipulate. However, I realize that I should interpose an objection. I am willing to so stipulate with counsel on the facts but I do reserve the objection that the stipulation tendered is irrelevant and immaterial, not tending to prove or disprove any of the issues in this case for the reason that the only question with which we are here confronted is whether or not Lebenbaum's liability to pay rent remains and, secondly, for the reason that the defendants Gawzner, since service of the notice in August, 1944, have maintained that there was no lease and, hence, no rent due.

The Court: You stipulate that to be a fact except that you do not acknowledge the fact as stated in the stipulation as having a bearing on the case?

Mr. Hearn: That is right; yes, your Honor. [94]

The Court: I think that stipulation may be entered subject to your objection, and that calls for a ruling, I imagine, as to the materiality or not.

Mr. Hearn: It is perfectly agreeable to me if your Honor wishes to withhold the ruling on that.

The Court: I will withhold the ruling——

Mr. Burrill: On the same basis, that it is subject to a motion to strike?

The Court: Yes.

Mr. Hearn: I think now would be a good time for me to move to strike the testimony of the witness Allen and the witness Frisbie to the effect that the Lebenbaum lease had no bonus value, or, as I understand it, they testified no market value, as of

July 10, 1944, for a period of occupancy beginning on that date and ending on June 1, 1946, upon each and all of the grounds stated in my objection to the witness Allen's testimony to that effect; and upon the further separate grounds as to each of the witnesses, first, that neither of the witnesses based his opinion in that regard on any sales of hotel leases occurring at or near the period of time so indicated; and upon the further separate ground that neither of the witnesses in arriving at that opinion took into account as an element in determining value the business operation of the property by the defendant Lebenbaum for the period from December 15, 1943, to July 10, 1944.

The Court: I will withhold the ruling on that motion [95] until the conclusion of the case.

Mr. Burrill: That establishes my case.

The Court: I would like to have both sides develop their theory of the case and put it in evidence. I know you object to each other's theories but I would like to have that in the record and then I can make a determination in the matter on any theory that I might want to adopt or that I might want to consider. It is the duty of the court to apportion this award in some way or other. This court has equitable jurisdiction in the matter. I think the law imposes such a responsibility on the court, notwithstanding your contention, Mr. Burrill, that the law is as you have stated it to be. I shall try to make that sort of a determination, following the law as closely as I can, as I think it applies to this

case, and to do equity in the case. I think I am called upon to do that.

LLOYD S. PETTEGREW

called as a witness on behalf of the defendant Leo Lebenbaum, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hearn:

I am an accountant. I am a partner in the firm of Horwath & Horwath in charge of the West Coast. We specialize in hotel accounting throughout the United States and we were so engaged in the year 1944. The territory of which I am in charge includes the Santa Barbara area and did include it in [96] the year 1944. The Miramar Hotel in Santa Barbara is among our clients. I am familiar with the property. I am acquainted with Mr. and Mrs. Gawzner, the owners of the property, and with Mr. Lebenbaum, the lessee. Our firm did the accounting for Mr. and Mrs. Gawzner for a substantial period of time prior to the time that the lease was entered into with Mr. Lebenbaum. I am familiar with the lease between Mr. and Mrs. Gawzner and Mr. Lebenbaum. In connection with the Miramar Hotel since the lease was entered into between Mr. and Mrs. Gawzner and Mr. Lebenbaum we opened up the books, made the original opening entries to reflect the leasing of the property to Mr. Lebenbaum, we instructed Mr. Lebenbaum's bookkeeper

(Testimony of Lloyd S. Pettegrew.)

in the keeping and maintenance of the records and periodically we sent one of our field men up who audited the transactions and prepared statements. That was done under my supervision. I am familiar with the contents of and the manner in which each of those periodic reports was made up and am familiar with the contents of them. I have with me a report made by our company concerning the portion of the Miramar Hotel for the period from January 1, 1944, to July 15, 1944. The report shows on the first page a letter outlining the scope of the audit. There is an index. There is a balance sheet. There is a statement of various balance sheet items, such as accounts receivable, a list of payments and accounts receivable. There is a profit and loss statement and eleven supporting schedules showing the results of [97] each department. The schedules include the income and expenses for the various departments. The report also shows a recapitulation of the lessee's portion from a financial standpoint.

Q. (By Mr. Hearn): Will you state the amount of the net profit resulting to the lessee for the operation of the hotel during the period from January 1, 1944 to July 15, 1944?

Mr. Burrill: Just a moment, Mr. Pettegrew, before you answer the question.

Your Honor please, I am going to object to that question upon the ground that it is incompetent, irrelevant, immaterial, and not proper direct examination, and upon the further ground that it is an

(Testimony of Lloyd S. Pettegrew.)

attempt to introduce the profits resulting from the operation of a business, and is inadmissible upon that ground, for the reason that the business of the tenant was not taken by the government in the condemnation proceedings; for the further reason that profits or losses from the operation of a business are not proper elements to be taken into consideration in a condemnation proceeding, as calling for speculation and conjectural matters, which have been held numerous times to be improper, and I have authorities that I would be glad to cite to your Honor, if you wish them.

(Argument of counsel omitted.)

The Court: Is it your purpose to offer the entire report in evidence?

Mr. Hearn: Well, if your Honor please, I really am [98] indifferent on that. I was trying to direct your Honor's attention by means of this testimony to the particular part of the report in which I am interested. If your Honor wishes to study the entire report in connection with it, I would be glad to introduce it.

The Court: Have you any objection to the entire report?

Mr. Burrill: Yes, your Honor, because I do not believe that the items that refer to the profits from the operation of the business are admissible. The rental previously paid is admissible.

(Further argument of counsel omitted.)

The Court: You mean the expert cannot take

(Testimony of Lloyd S. Pettegrew.)

into consideration the amount of rental paid under that operation in determining the market value of the leasehold?

Mr. Burrill: I did not say the rental paid, if your Honor please, and that was not the question asked of the witness. The question asked of the witness was: What were the lessee's profits? That is a far different question from an inquiry as to what rent did the lessee pay the landlord during that period of time?

The Court: I think that would be a proper inquiry as to the amount of rent that was paid during that time.

Mr. Hearn: If your Honor please, I might say that evidently counsel has misunderstood me. I agree thoroughly with what counsel says about the profits from a business conducted on a piece of property, that they are not recoverable as such [99] from the condemnor as damages sustained as a result of the taking. I agree with that and all those cases hold that, and that is all they hold.

I am addressing this evidence to a totally different question. What would fix the value of a piece of income property, and the net income of that property is most certainly the first thought that would arise in the mind of a person who is about to buy it; in other words, a man who would buy a piece of income property, a hotel, flat building, office building, or whatever it is. The first question is, what is it earning now, and, also, he would con-

(Testimony of Lloyd S. Pettegrew.)

sider the future earning possibility. So that is not addressed to the question of how much does Lebenbaum recover from the government immediately, but the question is what was the value of the leasehold estate, and that, as Frisbie himself testified, who was produced by the Gawzners, the first consideration that the prospective purchaser will take into account is what is the record of the property for earnings.

Now, as I say, it is addressed solely to the question of the value of the leasehold, and the General Motors case, your Honor, please, bears me out definitely.

The Court: I rather believe this would be an element to be considered. I think that counsel are agreed that the purpose for which the hotel must be used under the lease is for hotel purposes; at least, they contemplate such. Then, furthermore, I think counsel would also agree that a sublessee in considering how much he would pay Lebenbaum for a sublease would take into account what he could do on the premises without violating the lease or the law so as to make the most money out of the operations on the premises. He would consider, for example, how much he could make from the sale of rooms, food and beverages. He would consider how much he would have left after he paid the rent reserved in the lease. In computing the rent reserved in the lease, it would seem that he would have to have some idea of what he could make from the

(Testimony of Lloyd S. Pettegrew.)

items mentioned so that he would know how much gross he would have to pay to the landlord per month, in addition to the $1500, and in order to know that he would have to have some idea of the cost. I do not believe that a prospective sublessee is going to make any guess before he makes an investment of this kind, and that he would no doubt inform himself as to all of these matters and take them into consideration. I do not understand how an expert can place himself in that position and make a good summary here without considering all of these things that I have mentioned. Furthermore, I suppose you, gentlemen, are acquainted with Orgel on "Valuation under Eminent Domain."

Mr. Burrill: I have heard of the work. I have never read it, your Honor.

The Court: There is a statement there that the market value is equal to the excess of the rental value over the rent reserved. [101]

I think that is in line with your contention, is it not?

Mr. Burrill: Yes, your Honor, that is correct.

The Court: Now, in this work there is a case cited in this text on page 417, and it says this:

"The measure of damages is at what sum over and above the amount of rent reserved in the lease could the claimant have taken the lease into the market and sold it to a willing buyer on the date of the appropriation."

Then, since the lease before us in this case contains a provision whereby, in order to fix the rent

(Testimony of Lloyd S. Pettegrew.)

reserved, the profits must be ascertained, how can an appraiser testify as to how much over the rent reserved a buyer would pay unless he knows what the rent reserved would amount to?

Mr. Burrill: Your Honor please, if you are addressing that question to me, the rental payable under the lease has nothing to do with the profits. It is not a percentage of the profits of the business. That is what I understood your Honor to state just a moment ago in this question.

The Court: I am not stating that that element standing alone is to be considered. Mr. Hearn agrees with you that is not an element, the matter of profit, but if I were considering the purchasing of a sublease I would certainly consider the operations of the business and consider everything connected with it, and a purchaser would consider what he could make out of this, or that, or the other items. I think [102] all of those matters would be considered by him in ascertaining the value of that leasehold.

(Further argument of counsel omitted.)

The Court: I would like to see the report. I would like to see all of the operations between these two people. You gentlemen are at the opposite ends of a solution here. You are at the extreme ends. I will have to arrive at a solution which will be just and equitable, and I would like to get all the information I can. If you gentlemen want to furnish the court with the information, all right. Otherwise I will have to do the best I can.

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: Your Honor please, I cannot concede that we should introduce in evidence matters which the courts have held are improper to be considered, and I do not feel that I should permit that evidence to be introduced without objection.

The Court: Is it your purpose to introduce this report?

Mr. Hearn: Yes, your Honor, I offer the report in evidence.

Mr. Burrill: To which we object upon the ground it is incompetent, irrelevant and immaterial, not proper direct evidence, does not tend to prove or disprove the issues in the case, to-wit, the market value of the leasehold interest. It has a tendency to establish the profits, which the courts have held to be an improper basis for evaluation of property in condemnation proceedings; and it calls for speculative [103] and conjectural testimony, to-wit, the profits made from the operation of a business, and is entirely improper evidence on direct examination.

The Court: I am going to receive this evidence and reserve my ruling and you will have leave to make your motion to strike. I will reserve my ruling as to admissibility, but I will permit the evidence to go in at this time and you may make a motion to strike later on.

Mr. Burrill: An exception, please.

The Court: It may be noted.

(Thereupon the report was admitted in evidence as defendant Lebenbaum's Exhibit A.)

(Testimony of Lloyd S. Pettegrew.)

Q. (By Mr. Hearn): Now, Mr. Pettegrew, will you please explain the item "Amortization of Leasehold Cost and Improvements?"

(It was stipulated and ordered that it would be considered; that the same objection would be made to all questions in reference to the report, Exhibit A, that were made to the introduction of the exhibit; that the court would make the same ruling and that an exception would be noted to each ruling.)

(The witness continuing.)

This is a write-up primarily for tax purposes of the sums that Mr. Lebenbaum gave Mr. Gawzner, or agreed to spend on the property, in accordance with the lease. It is not connected directly with the operation of the hotel, but it is [104] more or less a financial deal of Mr. Lebenbaum alone. It should not be considered in arriving at an estimate of the operation of the hotel as a going business property.

Mr. Hearn: That is all. You may cross-examine.

Mr. Burrill: I move to strike the report upon the same grounds upon which I made objections to the introduction of the same.

The Court: I will reserve my ruling until the conclusion of the case.

Mr. Burrill: Exception, please.

Cross-Examination

By Mr. Burrill:

It is a fact that Mr. Lebenbaum paid to Mr.

(Testimony of Lloyd S. Pettegrew.)

Gawzner during the entire period from January 1, 1944, to July 1, 1944, substantially an average of $5,000 per month rent.

Mr. Hearn: That is all I have at this time, your Honor.

The Court: Are you going to put on any experts as to value?

Mr. Hearn: No, your Honor.

The Court: I will say this. I am not entirely satisfied with the expert testimony that has been introduced. I don't quite understand it, from the standpoint of the evidence given by these experts. They have apparently, one of them at least has attempted to construe the law, and I do not have the facts that I think I should have as a result of the giving of that testimony. You are not going to have any more [105] experts, you say. Therefore, I want to go over the record and see just in what respects, if any, the evidence is lacking, and which might be supplied.

It was stipulated as a fact, subject to the objection hereafter noted, that Mr. Lebenbaum paid the sum of $20,000 that was provided for in Paragraph 6 of the lease and that of that amount $19,983.05 had been spent jointly by Mr. Lebenbaum and Mr. and Mrs. Gawzner on the property in question during the period of January 1, 1944, to July 10, 1944, and that the remaining balance of $16.95 was on deposit in a joint bank account in Santa Barbara. Mr. Burrill objected to the introduction of

(Testimony of Lloyd S. Pettegrew.)

the facts in evidence upon the ground that it was incompetent, irrelevant and immaterial and had to do with a period of time prior to the time that the government took possession of the premises and upon the further grounds that it was not proper direct testimony and had no bearing on the market value of the leasehold.

The Court: I will receive the evidence set forth in the stipulation and reserve my ruling on that point also. I doubt whether it may be considered, but I am willing to think it over.

Mr. Burrill: Exception, please.

The Court: It may be noted. [106]

At a further hearing of the cause on April 25, 1947, it was stipulated that the sum of $91,296, being the portion of the award that had theretofore been stipulated should be allocated to restoration, repair and replacement of the property condemned, both real and personal, was the agreed amount that would restore the premises to their condition as of July 10, 1944, the date upon which the government took possession of the premises and that that sum included all items of ordinary wear and tear that occurred during the government's occupancy as well as all items of restoration for damage done during the government's possession in excess of ordinary wear and tear.

At a further hearing of the cause on June 6, 1947, there was presented to the Court a written stipulation dated June 6, 1947, entitled "Stipulation re

Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court," being Designation No. 25, covering the disposition of the portion of the award that was allocated to restoration, to wit, the sum of $91,296. The stipulation was approved as to form and substance by the parties involved, and by their counsel, in open court. Thereupon the Court executed the order attached to and made a part of said stipulation and thereupon the Court and counsel made the following statements:

The Court: This seems to dispose of that portion of the matter. Of course, the Court is not concerned any [107] further with whether the restoration is made or not.

Mr. Burrill: That is correct.

Mr. Hearn: That is correct.

At a further hearing of the cause on August 14, 1947, the Court made the following statements:

The Court: I believe that we should give further consideration to this case in view of the present situation.

It is my idea that if this case had been tried before a jury and if the jury had fixed the price which the government would have to pay that the verdict would have been arrived at on a basis something like this:

The jury, of course, would have been told to fix the market value of the property involved, and the

market value would have been defined somewhat in this manner:

According to a definition promulgated in the case of Sacramento Southern Railroad Company v. Heilbron, 156 Cal. 408, "Market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time allowed to find a purchaser, buying with full knowledge of all the uses and purposes to which it is adapted, and for which it is capable of being used."

The court feels that an informed buyer, negotiating for the purchase of Lebenbaum's lease, would scrutinize most carefully the terms of the lease; also, he would study at length the record of the operation of the establishment during the [108] period preceding the purchase of the lease.

He would try to arrive at an estimate of how much, if any, increase or decrease in revenue he could expect during the forthcoming period for which he, the buyer, expected to own the lease. He would consider the factors which would be most likely to cause such increase or decrease in revenue. He would then consider how much he, the buyer, or sub-lessor, in the event of a sub-lessor were considered, would be obliged to pay the lessor; how much he, the buyer, would be able to make over and above that figure and how much he, the buyer, could afford to pay the lessee for the lease.

An expert witness, in making his investigation prior to testifying, unless he could have found simi-

lar sales of similar properties, with similar leases, would no doubt have fortified himself with facts that I have mentioned.

He would have considered all the matters which he would have expected a buyer to consider; and he would have made the analyses which he would expect a buyer to make and, on cross-examination, he would have been able to give the court or jury the benefit of his figures.

However, the phase of the case that I have just discussed was not tried by a jury or by the court. Both of the litigants in this case, the lessor and the lessee, arrived at a compromise wherein they agreed with the government upon a figure which all parties stipulated represented the amount which the government should pay for the value of the occupancy of [109] the premises and for restoration. This figure at which you arrived was a compromise figure.

I believe it is true that both the lessor and the lessee have an interest in the property. What that interest was worth to each of them and what figure would have influenced them to consent to a sub-lease, had this property been sublet, or had that matter been considered the figure that would have been named for the purchase of such sub-lease would have been determined by them, I believe, in this manner:

I believe that the Gawzners would have demanded that they receive from the new tenant the rent to which they were entitled under the lease.

There being no fixed rent, such figure would have

to be determined by a consideration of what had transpired during the operation of the property, with a consideration also of what might be expected to transpire during the period for which the property would be sub-let.

Mr. Lebenbaum in also fixing the figure for which he would sub-let the property, sub-lease the property, would take into consideration how much he had earned in this enterprise and how much he was likely to earn before naming a figure.

I am not stating that in a condemnation case the profits likely to accrue can be recovered from the condemnor, but it is my belief that such profits should be considered, both by [110] the seller and the buyer in arriving at a market value of the property involved.

Mr. Allen, one of the witnesses for the defendants Gawzner, stated he had had experience in determining the market value of a leasehold, in determining whether or not a leasehold had a market value over and above the rental being paid therefor.

Mr. Allen stated that he had studied the lease and also the Horwath & Horwath Report on the operation. Mr. Allen was asked regarding the bonus value of the lease and he replied the lease had no bonus value, giving his reasons as set forth in the transcript, which are mainly, that the percentage rental mentioned in the lease is too high and that he never heard of a similar lease where the tenant was obligated to pay the landlord such a high rent.

Mr. Charles Frisbie also testified for the defend-

ants Gawzner. Mr. Frisbie also stated that he was of the opinion that the lease had no bonus value and his reason was that in his experience he had not found a lease that called for such a high rental in that it could not be sold to anyone for money on the date in question. Mr. Frisbie stated that he had knowledge of the operations of the lessee during the six months preceding July 10, 1944.

Mr. Frisbie further detailed his bases for this opinion stating that an appraiser would compare the terms of the lease on the property involved with the terms of leases on [111] other properties which could be leased.

Mr. Frisbie further stated that unquestionably the lessee made a profit during the six months' period of operation. He also stated that hotel properties were at an all-time high on the date of the taking; that there were not many hotel properties available. He also stated that he did not consider the operations of the lessee or the profits made in arriving at his opinion. He mentioned that the hotel had an 80% occupancy and that there was an upward trend. That the peak in hotel occupancy was reached in 1946.

Mr. Frisbie stated that because the terms of that lease were more burdensome on the lessee than other leases with which he was familiar, that this lease would not have a bonus value, notwithstanding the fact that the hotel had shown a net profit on its operation.

Mr. Frisbie stated that if he had figured on the business angle of this property during that period

of time, he would have figured a substantially higher figure. Mr. Frisbie further stated that he had been instructed by counsel for the Gawzners concerning the law and that he had been in the past instructed that he could not consider the profits the lessee was making in arriving at a market value and he could not answer a question concerning value which entailed a consideration of profits.

Mr. Frisbie also stated on cross-examination that he knew of no hotel available for lease in the vicinity during [112] the period of the government's occupancy.

Mr. Pettegrew testified as an expert witness for the defendant Lebenbaum. His firm, Horwath & Horwath, had opened the books when the hotel began its operations under Mr. Lebenbaum and he brought to court a report made by his company for the period of January 1, 1944, to July 15, 1944. Both counsel agreed that the rental previously paid would be admissible in evidence. Counsel for the defendant Lebenbaum stated at the hearing on March 21, 1947, that he agreed the profits would not be recoverable from the condemnor but insisted that they be considered in arriving at a market value.

The Court has already expressed itself as not satisfied with the expert testimony introduced. This expression does not refer to expert testimony with reference to the portion belonging to defendants Gawzner and unoccupied by defendant Lebenbaum. There is no controversy about that particular area

of land, although there is some little difference in the values.

I think I should now make my meaning clear so that there cannot be any misunderstanding. Under Section 258(a) of Title 40, U.S.C.A., the court may make an equitable distribution of the funds in cases such as we have before us. As nearly as I can gather, both of the litigants here contend that the Court should award the fund in its entirety to each of them, leaving the other nothing. Both stand on that [113] basis: either all or nothing to their respective sides.

None of the witnesses were able to testify regarding similar property affected by a similar lease.

To take all of the fund and give it to either the Gawzners or to Mr. Lebenbaum would not be to distribute the fund in an equitable manner. That would not do equity in the case, according to my manner of think.

It appears from the evidence that during the six months the property was operated by Lebenbaum he was making some money and that he paid the landlord a sum considerably in excess of the minimum rent.

I believe I also stated that I am not satisfied with the testimony of the experts for the landlord in this case, that is to say, I am not satisfied that the manner in which they qualified themselves to express their opinions which they expressed.

My efforts to examine one of them to determine the basis for his opinion brought forth practically nothing, except the fact that he had been instructed

what the law was and he had proceeded as he interpreted the law to be.

I feel that certain evidence should be adduced, and it is ordinarily the type that would be adduced on cross-examination of an expert witness who had properly qualified himself before testifying.

I should like to have evidence presented by a witness who would place himself in the position of a prospective [114] buyer on July 10, 1944, one who would take the figures for the previous six-month operation and try to arrive at similar figures for the period during which the property was to be subleased, to wit, the period named in the Third Amended Complaint. I use the word "subleased" in a broad sense, considering what happened in this case. This would have to be done in order for the prospective buyer to obtain any idea how much rent he would have to pay. These figures will assist me in arriving at my decision.

I have already asked counsel to agree upon an expert, and I have been informed that you are unable to agree.

I would now suggest that each counsel present evidence to which I have referred by their respective experts of their own choosing.

Following the above statement by the Court and in response to a question by the Court both counsel agreed that Mr. Pettegrew, the witness produced by defendant Lebenbaum, had not been questioned about nor had he testified as to the market value of the lease in question.

Thereupon discussion was had in reference to

the valuation of the use and occupancy of the property owned by the defendants Gawzner and not covered by the lease to defendant Lebenbaum, and the following statements were made:

Mr. Burrill: The point I make is that we submitted evidence (and it is uncontradicted and undisputed) as to the value of the use of that outside land. If Mr. Hearn was [115] entitled to question that value at all, which your Honor has just pointed out, he had his opportunity to produce his witnesses here in court. He failed to do so and failed to present any evidence on that issue at all. The evidence is uncontradicted before your Honor that the value of the use of those premises is $10,950.

Mr. Hearn: I was not prepared and am not now prepared to say that the evidence was false. I think the evidence was true that the value was $10,950, but I say there is not $10,950 there to pay it with.

The Court: But there is.

Mr. Hearn: Then, your Honor, if there is that much, then there isn't enough to pay for the rest of the property.

The Court: Those are two independent matters, I think, for the moment. But you did have your opportunity of contesting the value if you had seen fit to disagree with what the experts stated. I have no means of arriving at any other amount than from the evidence.

(Further discussion between Court and counsel omitted.)

Mr. Burrill: May I, for the purpose of the rec-

ord, at this time move that the Court order the distribution of the portion of the award to which defendants Gawzner are entitled for the area outside the land covered by the lease. I submit in connection with that motion that the testimony is undisputed that the value of that is $10,950. [116]

Mr. Hearn: Which motion I oppose, your Honor.

The Court: The motion will be taken under submission.

Now, about the further testimony that I have suggested?

Mr. Burrill: Well, if your Honor please, if I may, with due deference to your Honor's opinion, I shall state my position in connection with that as I understand it.

As I understand your Honor, you desire each side to produce testimony as to the value of the lease, taking into consideration the profit that would have been made by the lessee during the period of the government's occupancy?

The Court: Taking into consideration the factors that I have pointed out.

Mr. Burrill: I appreciate that. But among that is the one item.

The Court: Yes.

Mr. Burrill: And, as I say, with due deference to your Honor's suggestion in that connection—I might as well be frank and say this—I do not consider that the profit that would have been made by the tenant an item that is proper for considera-

tion in a condemnation proceeding. And if I would attempt to produce testimony along the line that your Honor has requested, it would be contrary to what my belief is.

Accordingly, I am in a position where I most respectfully decline to produce such testimony.

Your Honor appreciates that it is not any criticism of [117] your Honor's ruling.

The Court: I fully understand that. I am not at all sensitive or thin-skinned about this matter. You may speak freely expressing your opinion as you feel that you should express it.

Mr. Burrill: Your Honor knows that I have taken that position throughout and submitted briefs on it as early as last January on this exact point: that profits could not be considered. I have maintained that position throughout, and I do not feel that I can recede from it, your Honor.

Mr. Hearn: I might state, your Honor, that I am laboring under no such inhibitions as are bothering Mr. Burrill at the time, and I shall produce such a witness.

The Court: It is possible that the court may appoint a disinterested expert.

I believe these factors that I have mentioned are essential in arriving at value, and I should like some testimony along those lines.

You say you propose to have an expert qualify?

Mr. Hearn: Yes, your Honor, and I now assume it will be Mr. Pettegrew.

Mr. Burrill: So there will be no mistake, I will

oppose as vigorously as I am able, your Honor, any testimony which is based upon the profits which were made or anticipated to be made. [118]

The Court: I think you have already made your position clear in that respect.

Your position, as you stated it, is that you decline to participate in the producing of a witness, an expert witness, to testify along the lines I have suggested?

Mr. Burrill: Yes, your Honor, who would incorporate in his valuation and in the opinion that he expresses a profit which would have been made from the business.

I submit that the witnesses that I did produce had examined the report and had all of the information available to them, as appeared by their testimony. But I will not, as I am presently advised, produce a witness who will fix his value dependent upon the profit to be produced from the premises.

I hope your Honor appreciates that my refusal to comply with your Honor's request is not an arbitrary one but based purely uopn what I conceive to be the law. Otherwise, of course, I should be glad to comply with any request your Honor makes.

The Court: I understand your position. I am not forcing anything on you that is contrary to your conception of what the law is.

Thereupon further trial on the issues between the defendants Gawzner and Lebenbaum were had on October 22, 1947, and the following proceedings took place: [119]

Mr. Hearn: If your Honor please, I believe the

purpose of this hearing today is to present testimony, along the line suggested by your Honor, as to the value of the respective interests of the parties, the lessor and the lessee of the Miramar Hotel, and we are now prepared to present Mr. Pettegrew as a witness and present a report prepared by him, which I believe furnishes the information suggested by your Honor.

LLOYD S. PETTEGREW

a witness for the defendant Lebenbaum, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hearn:

I am an accountant. I am a partner of the firm of Horwath and Horwath in charge of the West Coast. We specialize in hotel accounting and have for 32 or 33 years. I have been with the firm since 1931. I was educated through high school, college and in accounting. I have made a special study of accounting.

In a general way a hotel accountant goes into various hotels and audits the books and records and prepares a financial statement from them. It is the usual practice to break down those reports into percentages of income from the various departments. There is a uniform system of accounts that has been adopted by the American Hotel Association, which is in use by probably two-thirds of the hotels [120] in the country, which departmentalizes the various operations of the hotel, such as, rooms,

(Testimony of Lloyd S. Pettegrew.)

food, beverages and so on, and it is the practice to list the income and expense items both by amounts and percentages. That practice is followed by our firm.

I am familiar with the type of case that is involved here and I have testified in several such cases. I testified for the government for the Norconian case before the late Judge Hollzer and I testified on the Mar Monte case before Judge McCormick and I am scheduled to testify on the Santa Barbara Biltmore. We prepared an estimated statement of profit and loss for a period in which the government had tenure and the purpose of the determination was to show rental valuation of the property. The government had these properties taken over on a temporary condemnation for the Army.

At Mr. Hearn's request I prepared a statement with respect to the Miramar Hotel for use in this case. I have it before me.

The report consists of an estimated profit and loss statement for the year ending July 10, 1945. It further shows a division of income as between the landlord and tenant. Generally speaking there is an opening letter and two pages of comments. There is a profit and loss statement. There is a rooms departmental profit and loss statement; a food departmental profit and loss statement; a beverage departmental [121] profit and loss statement; a beach club departmental profit and loss statement and a rent calculation.

In arriving at my conclusions in preparing this

(Testimony of Lloyd S. Pettegrew.)

report I placed myself back on July 10, 1944, and estimated or projected forward the operation for one year. This was done on the basis of past results both in the Miramar Hotel and similar hotels in Santa Barbara and other resorts in California and by use of trends that were in vogue or were existing at that time.

The figures showing the past results at the Miramar Hotel and other hotels were available to me.

The statements contained in the comments and the figures and calculations contained in the various statements in the report are true to the best of my knowledge and belief.

Mr. Hearn: I would like to offer the report in evidence.

Mr. Burrill: To which we object on the ground that it is incompetent, irrelevant and immaterial and that it is conjectural and speculative and an attempt to prove future profits in a condemnation proceeding and that no portion of the award that has heretofore been made in the action between the government and the defendants included an item of estimated profits.

The Court: The objection is overruled. The report will be received for what it is worth. It will be admitted subject to a motion to strike in the same category as the other exhibit. [122]

(Thereupon the report was admitted in evidence marked defendant Lebenbaum's Exhibit B.)

Mr. Hearn: You may cross-examine.

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: If your Honor please, without waiving my objection that I have made to the report, I ask for the privilege of cross-examination of Mr. Pettegrew for the purpose of establishing, if I can, that the report is conjectural and speculative, to substantiate my motion to strike, which I expect to make later.

The Court: Yes; you may cross-examine.

Cross-Examination

By Mr. Burrill:

This report, Lebenbaum's Exhibit B, shows an estimated and contemplated profit of $84,469.93 for the fiscal year July 10, 1944, to July 10, 1945. I used certain estimated figures in making up the report. For instance, in the room sales, I used a figure of $4.53 per room. That was the average room rate that was shown in July, 1944. I then used a percentage of occupancy of 94 per cent and multiplied the number of rooms by that expected occupancy and by the estimated figure of $4.53.

There had been an average of 94 per cent occupancy in the Miramar Hotel prior to July 10, 1944, in summer seasons. There had not been an occupancy of 94 per cent in the year 1944 because it was the winter season. The occupancy in 1944 up to July 10 had been considerably less than 94 per cent. The [123] figure of 94 per cent occupancy was not the occupancy of hotels of this category generally. It might have been that figure. It was in the 90's I know. For the years 1944 and 1945 the

(Testimony of Lloyd S. Pettegrew.)

occupancy was in the 90's in the average hotels of this size throughout the United States. That is a higher average than had pertained to hotels generally prior to 1944. I would say that the occupancy on an average for the year 1943 was four or five points lower than 1944. I don't recall from memory whether it was considerably lower than that. I don't know what the occupancy was at the Miramar in 1943. I think I knew what the occupancy was in 1943 when I prepared the report Lebenbaum's Exhibit B. I would say that the 94 per cent occupancy figure was an average throughout the fiscal year of July 10, 1944, to July 10, 1945, that I calculated.

I used a percentage of expense of room sales of 21.9 per cent as shown on Schedule 1 of Lebenbaum's Exhibit B. The Miramar Hotel had an experience rating of expenses for room operation in the fifteen days of July, 1944, of 35.17 per cent and an expense of 32.74 per cent from January 1, 1944, to July 15, 1944. In Lebenbaum's Exhibit B I have used a corresponding figure of 21.9 per cent. In a Horwath & Horwath report for the average of fifty transient hotels that have less than five hundred rooms the similar expense item is 28.5 per cent for the year 1944. In the year 1945 it is 29.4 per cent. The figures which I have just given correspond [124] to the figure of 21.9 per cent that I used in Lebenbaum's Exhibit B.

Referring to beverage sales in Lebenbaum's Ex-

(Testimony of Lloyd S. Pettegrew.)

hibit B, I estimated the amount of such sales to be $168,918.31; that is 83.6 per cent of the room sales. That is the ratio of beverage sales to room sales that existed in the Miramar Hotel in either the fifteen days of July, 1944, or the first six months of 1944, I don't know which. In other words, in estimating the percentage of beverage sales as compared to room sales I used the actual percentage that was shown for either the fifteen days in July, 1944, or the six and one-half months in 1944, but on the room expense item I did not use the experience record of the hotel. The percentage of 83.6 per cent of beverage sales to room sales is exceedingly high. The average for the same fifty transient hotels throughout the country was 45.5 per cent in 1944 and 44 per cent in 1945.

When I testified in connection with the Mar Monte Hotel I used a percentage of beverage sales to room sales of 22.7 per cent. That was the average of that hotel for the year ending June 30, 1944. I used that same percentage in the prospectus that I made of the Mar Monte Hotel.

I will explain why the ratio 21.9 per cent of expenses to room sales was lower in Lebenbaum's Exhibit B and the other figures that were put in evidence. There are two reasons, because we are comparing it with two different things. It is true that the expenses at the Miramar Hotel [125] were 38 per cent for the fifteen days in July and for the 6½-month period. That is abnormally high and

(Testimony of Lloyd S. Pettegrew.)

there is a very good reason for it. The reason was that the lessee took over and found a minimum of supply and cleaning items in the place. Perhaps he overstaffed the department for a while because he had part of the maids and housemen doing other duties. He knew it was high but only for this particular period. A further reason was that this was the winter period when sales dropped down but you still must have sufficient help to keep the rooms serviced. During the winter season of the year this room expense would normally be somewhere in the thirties. Over the period of a year it would drop due to the fact that the summer sales are heavy and the percentage drops. To compare it with the fifty transient hotels, there is not a hotel of the resort type of the Miramar included among these hotels. These are transient hotels located in cities, hotels like the Hayward, Alexandria, that we know of, where room rates are considerably lower than the $4.53 average and where the relation between the room rate and the service is not the same as existed in this hotel.

I considered the OPA situation. These were the room rack rates, which would have been the rates if the hotel had been subject to OPA and they are the rates which were fixed by the OPA after the hotel was turned back on June 1, 1946. I think the rates were the same both before and after the [126] government had the property. I got the items that go to make up this 21.9 per cent by taking the

(Testimony of Lloyd S. Pettegrew.)

items that appeared on the books, the various items, salaries, employees' meals and so on, and adjusted those to a normal operation. The operation for the 6½ months up to the time the government took it was not a normal operation. A new lessee came in and cleaned house. His expenses during that time in every department were abnormally high. This was occasioned by the fact that he was endeavoring to operate on a different basis than his predecessor. I took hotels in Santa Barbara and similar hotels and made a study and analysis, placing them in the Miramar position and what would have been the normal operation for one year from that date. The figures are compiled in Lebenbaum's Exhibit B taking into account information from the Miramar Hotel and other hotels in that area and the Pacific Coast.

In reference to the beverage sales, our study of the Mar Monte Hotel disclosed the relation between the beverage sales and the room sales was 22 per cent, but in the Miramar was 83.6 per cent. Those were the ratios that existed in those hotels and each one of those hotels was an entirely different unit in connection with the bar. Experience shows that in each hotel there is a definite relationship between the room business and the bar business. Some hotels purposely try to build up their bar business to attract outside patronage. Other hotels do not. It also depends upon [127] their location and popularity of their bar, but in each of these cases this was the actual going rela-

(Testimony of Lloyd S. Pettegrew.)

tionship between beverage sales and room sales and there is every presumption that this relationship or ratio would continue. In other words, as the room sales went up I increased the beverage sales in the same proportion as they existed prior to that time. I did this even though I found that in the two hotels which are approximately 2½ miles apart, they varied from 22 per cent in the Mar Monte to 83.6 per cent in the Miramar during that same period of time. That is due to the fact that the Miramar had a big volume of soldier drop-in trade. I increased those beverage sales in Lebenbaum's Exhibit B not on any estimation as to what the additional liquor sales would be but purely upon the percentage of the room sales regardless of whether there would be any more drop-in business, or less drop-in business. There was a definite ratio existing and the most scientific approach isn't to say, "Well, there are going to be 400 soldiers drop in the bar next week and each one of them will spend so much," but a study as shown that there are trends and there are relationships between the various departments, and it is also true that as the room sales go up the food sales and beverage sales also go up and they go up in approximately the same proportion. That is what I did in this instance regardless of the fact that in this hotel there was an exceptionally high beverage sale in comparison to the room sales. [128]

As the room sales went up I used the same percentage of beverage sales to determine what in my

(Testimony of Lloyd S. Pettegrew.)

opinion would be the sale of beverages in the hotel.

I used a percentage of the same room sales in computing the various expense items. In other words, my whole basis started with a calculation that the room sales would be 94 per cent times $4.53 times the number of rooms. I didn't calculate the expenses on the room sales. The report shows that the administrative and general expenses were 12.2 per cent. The actual ratio at the Miramar in July, 1944, was 18.65 per cent and for the year 1944 it was 14.94 per cent. I am referring to defendant Lebenbaum's Exhibit A. In Lebenbaum's Exhibit B the administrative and general ratio is 12.2 per cent as opposed to actual experience at the Miramar in July, 1944, of 18.65 per cent and for the six months of 1944 it was 14.94 per cent and the reason for it is the same as I told you in the room expenses; that this was a new operation at that time and it hadn't gotten down to normal.

I might add that there were also some expenses incidental to closing the place, sales of inventory and many things of that nature in connection with losing possession to the Army. I am not talking about liquor, I am talking about these expense items. I say they are higher than normal in percentage due to that fact. It is true that he made money on the liquor but we haven't considered that in making up [129] this Lebenbaum's Exhibit B.

In Lebenbaum's Exhibit B I used a repairs and maintenance ratio of 10.1 per cent. The Miramar

(Testimony of Lloyd S. Pettegrew.)

had shown in July, 1944, 34.59 per cent and for the six months of 1944, 22.16 per cent. The national averages show 10.2 per cent for the fifty transient hotels for the year 1944 and 11.1 per cent in 1945. My computation in Lebenbaum's Exhibit B varies by 1/10th of one per cent from the average hotel. This should be lower than the national averages because under this lease the landlord was to take care of repairs to the building and roofs, so the tenant's repair expense would be less than normal.

The actual percentages at the Miramar of 34.5 per cent and 22.5 per cent are ridiculous. It is due to the fact that he had a great many men working and a great amount of material expended to put the place in order when he took it over. The total unapportioned expenses at the Miramar was 62.49 per cent for the first fifteen days of 1944 and the average for the first 6½ months of 1944 at the Miramar was 48.11 per cent and the average for the fifty transient hotels in 1944 was 44 per cent and in 1945 it was 45 per cent. In Lebenbaum's Exhibit B I used 31 per cent in comparison to those figures. I think I have explained the reason for the differences.

In Lebenbaum's Exhibit B I showed an estimated profit of $84,469.93 for the fiscal year. During the period of actual [130] operations at the Miramar from January 1, 1944, to June 30, 1944, in the first report we prepared we showed a profit of $7,957.06. In a revised report it shows a profit of $8,482. The principal revision was by reason of the

(Testimony of Lloyd S. Pettegrew.)

fact that all of the liquor was sold when the Army came in. We made another report in October, 1944, for the period from January 1, 1944, to July 15, 1944, and showed a profit of only $5,170.67. On July 31, 1944, we made a report on the Miramar Hotel of the operations from January 1, 1944, to June 30, 1944. That report showed that Mr. Lebenbaum had made a profit of $7,957.06. That is not Lebenbaum's Exhibit A. On October 6, 1944, we made another report for the Miramar Hotel for the period from January 1, 1944, to July 15, 1944, and showed a profit of $5,170.67. On December 6, 1944, we made another report from January 1, 1944, to July 15, 1944, in which we showed a profit of $8,482.67. That is Lebenbaum's Exhibit A but it is not the same operation because the figures are different. It was the same hotel. When the Army took over the Miramar Hotel Mr. Lebenbaum had a lot of things on his hands; he had liquor; he had cleaning supplies, soap and a thousand and one things; they are broken packages. It so happened that subsequent to the preparation of the first report Mr. Lebenbaum decided to write-off a lot of advertising matter that he had, a lot of loss he had incurred in guest's soap and things like that. Subsequent to that second report he went out and sold some items, principally [131] liquor, at a profit and some of those items that had been written off, he got some cash for, so that raised the result to $8,400.

(Testimony of Lloyd S. Pettegrew.)

Q. (By Mr. Burrill): In the period of the six months from June 1, 1946, to December 31, 1946, Mr. Lebenbaum was operating the hotel and made a profit of $2,001.38, did he not?

Mr. Hearn: That is objected to as irrelevant and immaterial being for a period of time subsequent to that which is covered by the period here under inquiry and a totally different operation resulting from the fact that at that time Mr. Lebenbaum had to take over a damaged hotel, hardly fit for operation, and which hadn't been open to the public for a period of two years. I don't think the situation is at all comparable.

The Court: It is cross-examination. The objection is overruled. It is admitted only for the purpose of cross-examination, testing the ability, whatever term you want to use, of this witness insofar as he is concerned but not for the purpose of influencing any figures that are pertinent in this case.

The Witness (Continuing): That is correct, Mr. Burrill.

Q. (By Mr. Burrill): Do you know what percentage of occupancy there was during that period of time I have just mentioned?

Mr. Hearn: That is objected to as irrelevant and immaterial. [132]

(Argument of counsel omitted.)

The Court: I don't know that that would establish anything in relation to the projections which the

(Testimony of Lloyd S. Pettegrew.)

witness made when he prepared this Exhibit B. As I understand it, that was merely a hypothesis, wasn't it?

The Witness: That is right.

The Court: But you may proceed. I am interested.

Mr. Hearn: May I be heard, if your Honor please?

The Court: Yes.

Mr. Hearn: As I understand the purpose of Mr. Pettegrew's report Exhibit B, it is that he would be required to put himself in the position of a prospective purchaser of a running hotel, to be operated for a future period, not a hotel which had been taken over and pretty near destroyed by the Army. And it seems to me that, when Mr. Lebenbaum goes back into possession and takes the burden of trying to operate this hotel which the Army had just vacated, he is not in the position that would have been represented by a prospective purchaser standing at the threshhold of July 10, 1944, and looking forward to the possible profit he might have made.

The Court: I think that is correct but I don't understand that you used this witness for that purpose, as to what a well-informed buyer might anticipate in arriving at the value.

Mr. Hearn: Yes, your Honor; that is what the evidence [133] is offered for, just for that purpose, and, certainly, that man, intending to operate and bidding on and attempting to purchase a hotel which

(Testimony of Lloyd S. Pettegrew.)

he was going to operate, and which the government was never going to go near, wouldn't take into account the damaged condition which would result in 1946.

The Court: Then, I understand the witness is testifying as to a figure which might be used as a profit that a well-informed buyer might anticipate he could make out of the hotel during this operation, under lease, for a period of one or two years from the taking?

Mr. Hearn: Yes, your Honor. That is what I understood was your Honor's suggestion.

The Court: It was but I didn't quite read your report in that light. I thought you were trying to work out something else.

Mr. Hearn: We have, certainly, a well-informed hotel man here and he puts himself in that position to show the anticipated profit for the future period, and that is offered in evidence here on the assumption that the prospective, well-informed buyer on that first date would have taken those anticipated profits into account.

Mr. Burrill: May I be heard, if your Honor please? I don't so understand that the witness was offered as an expert to express an opinion as to the value of this lease or anything of the kind because he, certainly, hasn't laid any foundation for that purpose. [134]

The Court: I tried to direct your thoughts along those lines but, when this exhibit came to me, I

(Testimony of Lloyd S. Pettegrew.)

must have misread it or didn't understand that that was your purpose.

Mr. Hearn: It most certainly is. I am sorry if I misled your Honor in my communication to you.

The Court: You were attempting to effect a division of the moneys available, based on the profits which might have been anticipated?

Mr. Hearn: Yes; that is true, your Honor.

The Court: I believe that is the same thing I had in mind.

Mr. Hearn: That is true, your Honor. We are endeavoring by this testimony to show what the prospective interest of both the lessor and the lessee would have been and that is why that ratio is inserted in this report. As I understand it, your Honor has in contemplation a division of this money, which is now in the registry, between the lessor and the lessee, based upon the value of the leasehold, of both the reversion and the leasehold, as it would have been on July 10, 1944, taking into account the prospective profits of both of these men, and this report Exhibit B is offered for precisely that purpose.

Mr. Burrill: Then, if your Honor please, I renew my objection and I move to strike the report because it is an obvious attempt to recover out of a condemnation proceeding by anticipating the profits that might have been made and they [135] are not recoverable in a condemnation proceeding, and I submit there are cases——

Mr. Hearn: It is not an attempt, if your Honor

(Testimony of Lloyd S. Pettegrew.)

please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly.

The Court: You are trying to apportion this money according to the formula worked out by this exhibit?

Mr. Hearn: That is right.

The Court: But I want information as to the factors which might be considered in arriving at a value.

Mr. Hearn: If your Honor please, if I might have the liberty of turning to your Honor's statement on the matter——

The Court: What a well-informed buyer would look into and anticipate.

Mr. Hearn: And that is what I intend to offer by this Exhibit B. Possibly I have bungled it but that is what I intend by it, just exactly that and nothing else.

The Court: That is to say, that your figures have a tendency to show what a well-informed buyer might anticipate he could make out of the hotel during this operation?

Mr. Hearn: That is correct and, at the same time, to establish what the ratio would be between the lessor and the lessee, for the purpose of determining a division of this money here. That is what the intent is. [136]

The Court: Suppose we ask the witness. What

(Testimony of Lloyd S. Pettegrew.)

is your theory of that report? Tell us in your own words and in plain language.

A. I made up a report of the estimated profits for one year, taking into consideration rent, which is an expense, and which is also that which accrues to the lessor.

The Court: What did you have in view when you made that estimate?

A. I didn't know what your Honor wanted. I was asked to make up this statement. It can be used for two or three purposes. It, certainly, would be the basis for a buyer to base his offer of purchase price on, standing at that time, to know what the anticipated earnings were, and then he would simply calculate in his own mind the number of times the earnings he would offer for this lease. At the same time, to arrive at this figure, we have to calculate the rent and take it in as an expense because, regardless of whom the lessee was, he would have to pay the rent. So, by simply taking the net profit available to the lessee and the rent which he has previously determined, you get a ratio. I don't know what the purpose of making this report up was. I was engaged to do it. Mr. Hearn could probably tell you that.

Mr. Hearn: I just told his Honor what my purpose was.

The Court: That is what I have been driving at, what a buyer might anticipate and consider in making a purchase.

A. There is the figure, your Honor. [137]

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: I am going to object to the witness stating anything about that because, if your Honor please, there has been no foundation laid to qualify this witness as an expert upon the market value of leaseholds. He is qualified as an accountant and I haven't questioned that but I certainly misunderstood the report and, if it is what Mr. Hearn says it is—he says it isn't an attempt to recover profits, but I can't read the English language if it is not an attempt to recover it and squarely so because it purports to divide the award into percentages between what this theoretical lessee would have made and what the rent would have been to the landlord under this same theory, and it is a direct percentage between those two.

Mr. Hearn: May I read from the transcript, if your Honor please, of August 14, 1947, page 11, line 11? This is your Honor's statement: "I should like to have evidence presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six-month operation and try to arrive at similar figures for the period during which the property was to be sub-leased, to wit, the period named in the amended complaint. I use the word "sub-leased" in a broad sense, considering what happened in this case. This would have to be done in order for the prospective buyer to obtain any idea how much rent he would have to pay. These figures will assist me in arriving at my decision." [138]

(Testimony of Lloyd S. Pettegrew.)

The Court: That is the question I asked and that is the information I wanted. If that report was made for that purpose, well and good.

Mr. Hearn: Your Honor went on further to say, in line 24, "I would now suggest that each counsel present evidence to which I have referred by their respective experts of their own choosing and that this be done in this manner: We can arrange for a date when the respective experts may testify and be subject to the questions of their counsel and opposing counsel and of the court."

That is most certainly what I had in mind, and it would be probably impossible to find a better expert witness than this man, to stand at the threshold of this taking by the government and arrive at the prospective profits and prospective rent that the prospective buyer would take into consideration.

The Court: Is there anything further, Mr. Burrill?

Mr. Burrill: No, your Honor. I have had my say.

The Court: Go ahead.

Q. (By Mr. Burrill): I have forgotten where I was but I think I had completed, Mr. Pettegrew, that the profits, for the period of seven months from June 1, 1946, to December 31, 1946, at the Miramar Hotel, were $2,001.38, is that correct?

A. That is correct.

Mr. Hearn: To which I renew my objection, if your Honor please. I think it is entirely irrelevant

(Testimony of Lloyd S. Pettegrew.)

to the question [139] propounded by your Honor and, certainly, beyond the period covered by the government's occupancy and not a comparable operation or not an operation that is relevant to the type of leasehold interest that the prospective buyer, standing at July 10, 1944, would have wanted to buy.

The Court: I am inclined to believe that is correct, although it may have something to do with the competency of the witness to make these calculations, only for the purpose of cross-examination. I won't consider it for any purpose except to determine the witness' qualifications in giving his testimony.

Mr. Burrill: If your Honor please, I have two purposes in mind in asking the question. The first one is to show that the actual operations by the tenant on this property are nothing like this hypothetical $84,000 that the witness has testified to. That is a matter of testing his knowledge and credibility as an expert accountant, estimating what that profit would be; and, secondly, I have in mind the purpose of showing that this report that he has gotten out is purely speculative and conjectural and an estimation of future profits, because I propose to make a motion to strike that when my cross-examination is complete.

The Court: The witness states it is speculative, do you not?

The Witness: It must be. [140]

Mr. Burrill: Then, if the witness concedes it is

(Testimony of Lloyd S. Pettegrew.)

speculative, I again renew my motion to strike and my objection to it. It can't be founded on fact.

The Witness: Maybe you know a different definition of "speculative" than I do.

Mr. Burrill: I agree perfectly with you, Mr. Pettegrew, and that is the basis of my objection, because I think it is absolutely improper in a condemnation proceeding, if your Honor please.

The Court: That objection will be overruled.

(The witness continuing.)

From January 1, 1947 to June 30, 1947, the profits of Mr. Lebenbaum in the operation of the hotel were $3,116.65. That is a total of slightly more than $5,000 for a year and a month. There is no item in that figure for Mr. Lebenbaum's personal services. He has another manager up there. That includes Lebenbaum's compensation for whatever his own personal services are worth. I know that Mr. Lebenbaum is at the hotel most of the time. I don't know what he does. I know he doesn't manage the hotel. He has hired a manager for the hotel. I assume he puts in his personal efforts up there and the profit shown in the reports is in part at least compensation for whatever service he renders and the same thing is true as to the profit he made in the operation of the hotel in the early part of the year 1944.

I do not know what the percentage of occupancy was during [141] this last period of time, namely, from June 1, 1946 to July 1, 1947. I don't know

(Testimony of Lloyd S. Pettegrew.)

that the hotel was between 90 and 95 per cent occupied during the fall of 1946. I have heard but I do not know of my own accord that Mr. Lebenbaum was charging rates in excess of the average rates that are shown in Lebenbaum's Exhibit B during this period of time subsequent to June 1, 1946.

Q. (By Mr. Burrill): Do you know what occupancy was in the spring of 1947?

Mr. Hearn: That is objected to as irrelevant and immaterial and beyond the scope of the period here in question and beyond the purview of any contemplation of a prospective buyer standing as of July 10, 1944, which I am attempting to prove by this report.

The Court: The question may be asked for the purpose of showing discrepancies, if any, in the method used by this witness. It is merely for the purpose of testing his credibility.

The Witness: I don't believe I can answer the question, Mr. Burrill, because I don't believe Mr. Lebenbaum keeps any occupancy statistics. I don't know that there weren't any vacancies during the fall of 1946. I have talked to Mr. Lebenbaum occasionally and he would say that business was pretty good. I did not ask him what his occupancy was. I did not ascertain what his occupancy was for the first six months of 1947 and I haven't the slightest idea what it was [142] for the period from June 1, 1946, to December 31, 1946. In Lebenbaum's Exhibit B it was my opinion that the occupancy would

(Testimony of Lloyd S. Pettegrew.)

have been an average of 94 per cent right up to the first of June 1946.

In Exhibit B I took into consideration the sales of beverages would continue throughout the period of the government's occupancy. I knew that the government did not take over the liquor license at the Miramar Hotel from the defendants.

Mr. Hearn: If your Honor please, may the answer be stricken for the purpose of an objection.

The Court: Yes.

Mr. Hearn: That is objected to as irrelevant and immaterial. Again going back to the position of the prospective buyer on July 10, 1944, it would not contemplate any taking over by the government or any liquor license or anything else.

(Argument of counsel and comments of the Court omitted.)

The Court: The answer may be reinstated.

The Witness: Yes, I knew it. In Lebenbaum's Exhibit B I used a computation of supposed sale of beverages on the Miramar premises during the period of time the government was in occupancy but I didn't consider that the government was operating this hotel. I considered that a hotel man would be operating it and if a hotel man operated it, he certainly would have a bar there. In other words, in arriving at the [143] profit that is shown in Lebenbaum's Exhibit B, I took into account assumed sales of beverages on the Miramar Hotel premises during the period of July 10, 1944 to

(Testimony of Lloyd S. Pettegrew.)

July 10, 1945 and for the period of July 10, 1945 to June 1, 1946.

The Court: Food, also?

The Witness: Yes.

The Court: And all this is projected on the experience of those six and a half months, is that correct? It is all based on that theory?

The Witness: Yes, sir; and it is adjusted to what normal operations would be because the tenant took it over and had it for a period of six and a half months, during which his expenses were away out of line compared with normal expectancy. In Lebenbaum's Exhibit B on the assumed operation the rental that would be paid to the landlord for the use of the premises would be $91,648.02 and for the 22⅔ months that the government was in occupancy the rental would have been $173,112.80. The rental in the lease and the rental used in the computations in Lebenbaum's Exhibit B is based upon the gross business.

It is correct that a prospective purchaser of the lease whether he would have made a penny or whether he would have made a $100,000, he would have had to pay the landlord $91,648.02 on the amount of business that I assumed would have been done during that period. If he hadn't done that much business, he would have paid less rental. The rental [144] that I assumed is again based upon the assumed sale of services at the hotel. It is correct that if those services had been sold that amount of room sales and that amount of liquor and that

(Testimony of Lloyd S. Pettegrew.)

amount of food, he would have to pay the rental whether he had made any profit or not. It is also true that one operator may take over a hotel and make a profit and another one may lose money in the operation, but under this lease he is obligated to pay the rental whether he makes a profit or not.

Mr. Burrill: If your Honor please, I again move to strike Lebenbaum's Exhibit B from evidence upon the ground that the witness himself has admitted that it is speculative. I believe the cross-examination has established that it is; that it is an attempt to show profits; that it is conjectural; and that it is improper evidence in a condemnation proceeding or in any attempt to apportion the award that has been rendered in a condemnation proceeding.

The Court: That is in line with similar motions. My previous ruling was to take it under submission as I remember. It will be the same ruling.

Mr. Hearn: I oppose the motion on the same grounds that I have heretofore stated. In line with your Honor's suggestion, the report is offered for the purpose of establishing value both as to the landlord's interest and the lessee's interest, taking into account prospective profits that an informed purchaser would have considered, who was a prospective [145] purchaser at the time that the government took over, he taking into consideration that he was going to operate the hotel, in the place of the lessee Lebenbaum, as a private enterprise.

The Court: And your theory is that that would

(Testimony of Lloyd S. Pettegrew.)

be the result that a well-informed buyer might anticipate in considering the purchase of that lease or sublease?

Mr. Hearn: Yes, your Honor.

Redirect Examination

By Mr. Hearn:

Q. Is it your opinion that the same rate of operation would continue from the period of July 10, 1945 to June 1, 1946.

Mr. Burrill: The same objection, if your Honor please.

The Court: The same ruling.

The Witness: It is.

The Court: Whatever hypothesis you built up in this Exhibit B was based on——

A. It was based on that and adjusted to normal conditions and the results of similar hotels.

The Court: During the first six and a half months, what was the ratio of Lebenbaum's profit to the rental that was paid?

A. I don't know, your Honor; I do not have the figures.

The Court: It was about three and a half times, was it not? Look at the exhibit there. Was it 3½ to 1?

A. About that. [146]

The Court: When you made your compilations or computations in Exhibit B, you placed yourself in the position of a prospective buyer of the lease, did you?

(Testimony of Lloyd S. Pettegrew.)

A. I think so; yes.

The Court: As of July 10, 1944?

A. I stood right at that date, projected forward.

The Court: What does Exhibit A show the occupancy of the hotel to be on July 10, 1944?

A. It doesn't show it, your Honor.

The Court: Do you know what it was at that time?

A. No; I don't. Occupancy figures which are of a specific nature have not been kept in this hotel as long as I can remember, which goes back to 1940 or 1941. Nobody kept them.

The Court: What factors did you take into consideration that would lead you to believe that there would be an increase? You increased the occupancy from 84 per cent to 92 or 3 per cent, whatever it was.

A. I used 94 per cent, your Honor. I didn't increase the occupancy because we didn't know what the occupancy at the Miramar was nor what some other hotels of a comparable nature were. And, as a matter of fact, during this year under review, we have found out, and this is in connection with the Mar Monte case—we found that the occupancy was considerably higher than 94 per cent for approximately the same period, and we used the 94 per cent in the Mar Monte case and it was accepted. [147]

Mr. Burrill: Just a moment. I am going to object to the witness stating what was accepted in some other case.

(Testimony of Lloyd S. Pettegrew.)

The Court: You may state what figure you used.

A. We used 94 per cent in the Mar Monte case, which, as Mr. Burrill said, was only 2½ miles away from the Miramar, and that was on a conservative basis. So, in line with the same procedure, we established the Miramar occupancy at 94 per cent for this period. Undoubtedly, if it had been open and operated by Mr. Lebenbaum during those war years, I am confident that the occupancy would have been very close to 100 per cent because there was a definite shortage of rooms all up and down the Coast and in Santa Barbara in particular.

The Court: How did you arrive at that figure in Exhibit A of the occupancy of 84 per cent, or was that the figure?

A. I don't know of any 84 per cent figure, your Honor. There is nothing in here about the occupancy. It would be under "Rooms" in Schedule B if there was any occupancy. I have no knowledge of an 84 per cent occupancy at any time. There are no occupancy figures in here.

The Court: I found that figure somewhere but I don't recollect just where it was.

A. I don't think it was mentioned today.

The Court: It might be reflected in the gross room sales. Would that appear there? There was an increase in the gross room sales? [148]

A. Here we have a 15-day period and here we have six and a half months and we projected Ex-

(Testimony of Lloyd S. Pettegrew.)

hibit B on a period of a year, but there has never been any occupancy calculated at this hotel to the best of my knowledge and that goes back to the landlord's operations.

The Court: I notice in your Exhibit B you used about a 70 per cent increase in the gross room sales over what they showed in Exhibit A, is that correct?

A. I don't know. There would be an increase.

The Court: Will you look at it and see if that is approximately correct, and about 33⅓ per cent increase in beverages and about the same increase in food sales?

A. That would run in proportion.

The Court: I would like to have you explain the reason for this increase.

A. The reason for the increase, your Honor, is that this period from January 1 to July 15, as presented in Exhibit A, represents what you might term two adverse factors. The first was the taking over of the hotel by a new man, in this case Mr. Lebenbaum, who had to build up both the volume of business and the physical appearance of the place, and, secondly, this is the slack season, the off season, in a resort, January 1 to July 15. Your real business starts on the 1st of July.

The Court: And this is your explanation?

A. Yes, sir. [149]

The Court: In Exhibit A, the actual profit of operation—that is about 6 per cent, is it not?

A. 6 per cent of what?

(Testimony of Lloyd S. Pettegrew.)

The Court: Will you look at Exhibit A?

A. Yes; approximately that.

The Court: And in Exhibit B——

A. It is 20 per cent.

Q. Will you explain the difference and the reason for the difference?

A. The same reason prevails all through these statements. Mr. Burrill has submitted statements, two or three of them, and each one doesn't correctly portray the normal operations. In one case Mr. Lebenbaum has just started in. He has to put the property in shape and he is working in the winter season. Now, when you go, as Mr. Burrill did, to 1946, when Mr. Lebenbaum again took the property over, it was terribly run down. He didn't have a guest in the house. He opened there one day. He is standing there with an empty hotel. It is obvious that you can't fill a hotel up in a day or week or even a month when it has been closed all this time. And, in addition to that, you have a tremendous amount of what we call pre-opening expenses that are of a non-recurring nature and that are only incurred in properties the first six months of getting a new operation started. So that each one of these six-month statements which were made up does not reflect a condition or is not applicable to a man, standing on [150] the threshold of July 10, 1944, as a prospective buyer. He is not buying a property subject to those conditions. And for that reason this statement would differ materially from

(Testimony of Lloyd S. Pettegrew.)

either of these. In other words, Exhibit B is what Mr. Lebenbaum or some other operator would normally expect after he had gone through this period. There is one more factor, your Honor, in comparing these statements. This statement is a net profit after depreciation. This figure is available before depreciation.

The Court: Which figure?

A. This $84,000. There has been no depreciation deducted from that. That would account for part of the difference.

The Court: That is, the lessee would have received $84,000 during that period or would have earned it?

A. That is correct.

The Court: And the landlord would have earned approximately $103,000?

A. No; he would have earned $91,000. The depreciation as it is used today is merely an allowance for income tax purposes.

The Court: Is that $84,000 for a year's operation or two years?

A. That is for one year.

The Court: So, assuming it would be $84,000 for one year—and the landlord's, you say, is how much? [151]

A. $91,000.

The Court: Yet, the actual earnings during the six months' period were the ratio of $8,000 to approximately $30,000 or thereabouts?

(Testimony of Lloyd S. Pettegrew.)

A. It is really $10,000, your Honor, because it is the profit before depreciation.

The Court: The report shows that he drew out $9600 and, yet, his earnings were only in the neighborhood of $8,000 or a little less.

A. His cash earnings were $10,884.

The Court: And the landlord received during that period of time approximately how much?

A. $30,000. If the tenant hadn't been forced to make these heavy expenditures—for instance, Mr. Burrill brought out these repairs were something like 47 per cent of his sales—if he hadn't made those of his own free will, then his $10,000 would have been pretty close to the $30,000, but he chose to put his money into the place to improve it and, in doing that, reduced his net profit. These were expenses all of an unusual and non-recurring nature.

The Court: He would have continued to have had expenses, of course?

A. But not in that volume. The average hotel expends 10 or 11 per cent of its room sales on repairs and maintenance throughout the country, California, New York, Florida, anywhere you go. During this six months' period the lessee [152] voluntarily spent 22.16 per cent.

The Court: And during this projected period, how much did he spend?

A. I think it was 10.1 per cent, which is the normal expectancy.

The Court: I believe you gave the reason, what

(Testimony of Lloyd S. Pettegrew.)

factors led you to believe that there would be an increase in the hotel occupation.

A. Yes, sir.

The Court: I think you have stated it, or haven't you?

A. That is quite correct.

The Court: That is, you base it on the experience of these other hotels, is that correct?

A. Right.

The Court: Is there any further examination?

Mr. Hearn: I would like to ask Mr. Pettegrew a question.

Redirect Examination
(Resumed)

Q. (By Mr. Hearn): Mr. Pettegrew, were you personally familiar with the physical condition of the Miramar Hotel when Mr. Lebenbaum took it over on December 15, 1943? A. Yes, sir.

Q. And can you state generally to the court what its condition was?

A. It was not in good physical shape. It was quite necessary to expend a considerable amount of money to get it in [153] reasonably good shape and that is what Mr. Lebenbaum did.

Q. And would you say that, by the time the Army took over on July 10, 1944, Mr. Lebenbaum had put it in good shape?

A. Yes; I would say he had.

Q. In condition for a normal operation?

A. That is correct.

(Testimony of Lloyd S. Pettegrew.)

Q. And a prospective buyer of the lease, at July 10, 1945, would have the benefit of those expenditures of his? A. That is correct.

Q. And would have been able to carry on a normal operation promptly from that date on?

A. He should have been.

The Court: Considering this ratio of 3½ to 1 we have talked about as the income of the landlord over the income of the tenant, during the period of operation, doesn't it occur to you——

A. It is less than 3 to 1, your Honor. It is 30,900 against 10,884.

The Court: You took the lower figure, apparently.

A. That is out of line, your Honor, and the reason it is out of line is that the tenant's expenditures were so much greater than the ordinary expenditures that it distorted the ratio in this particular case.

The Court: So, when you project 52 per cent for the landlord and 47 per cent for the tenant, it seems rather——

A. That is close to 50-50 and it is almost 3 to 1.

The Court: I would say that is rather a steep increase.

A. It is quite a difference. This is what would normally happen and this is what happened in this short period of six and a half months: If the tenant had not put all his money into fixing the place up and getting it going, then the ratio would have

(Testimony of Lloyd S. Pettegrew.)

been much nearer this one. In other words, this $10,000 profit would have been increased to perhaps 25 and you would have had somewhat near this figure.

The Court: Of course, you had to take into consideration——

A. I am not saying he is not going to make any repairs at all. If he had accepted this place in first-class physical shape, then this ratio would probably have prevailed rather than this one.

The Court: When you say "this one" you mean Exhibit B would prevail?

A. That is right; but, due to the fact that he had to spend all of this money, his results were distorted for the first six months' period. And the same thing is true if you go on to 1946 because he, again, had to take the thing and it was in worse shape than the first time he took it over. The Army had moved out. So you can't make any true comparison by using a period of distortion.

The Court: However, you are taking into consideration a factor that is not reflected on the books, aren't you?

A. No, sir. [155]

The Court: You say, when he takes it, he has considerably more repairs that he won't have to do again and things of that kind?

A. That is a physical condition that a buyer purchasing the property would know of physically.

(Testimony of Lloyd S. Pettegrew.)

Further Recross-Examination

By Mr. Burrill:

I wouldn't say that the repairs and maintenance at the Miramar Hotel have always been high in comparison because it is an old property. I know that in 1941 the repairs and maintenance exceeded 17 per cent of the gross room sales because Mr. Gawzner had just taken over the property. In 1942 it was 13.7 per cent. In 1943 it was 20.14 per cent. There was an unusual factor in that year. I think Mr. Gawzner built some more cabanas and charged them to expense instead of capitalizing them. In 1944 the percentage was 22 per cent. Mr. Lebenbaum claimed that in the period of time that he took over after the government went out that he charged to repairs and maintenance the unusual expenses that had to do with the damage done by the government. I know that he set up an account and claimed in court that he didn't do so and asked for a refund out of the restoration account for those extraordinary items but he said afterwards there was a lot more than he had claimed. It is a fact that he claimed that he had expended over $22,000 for restoration and he also claimed there were repairs that he should have gotten in. I don't [156] know what the basis of his claim was but the report for the six months ending June 30, 1947, shows an expenditure of 10.1 per cent of room sales for repairs and for the three months after that 9.8 per cent. So apparently in the 1947 period he is

(Testimony of Lloyd S. Pettegrew.)

running at normal on his repairs and maintenance. I never checked the list he submitted as to what were repairs and maintenance and what was restoration cost in connection with this case. I don't know whether those items he claimed were restoration items were actually repair and maintenance items. The statement I made awhile ago was based upon what Mr. Lebenbaum told me. I have never examined the list which he submitted to the defendants Gawzner and which he claimed were restoration items.

It is correct that in Lebenbaum's Exhibit A I said the profit is $10,000 plus. There is no entry on the books of a salary for Mr. Lebenbaum. The $10,000 represents what he earns for his services, his investment, or whatever you want to call it, but it includes his personal services. In other words, no salary was taken out for Mr. Lebenbaum's personal services before I arrived at the $10,000 profit. I charged against that profit of $10,000 an amortization of leasehold costs and that is where I arrived at the $8,000 figure. No, he would not have to take it out of his profit each quarter or each year as he went along or take it out of his profit at the end of the time. He paid $20,000 to rehabilitate the place. He put a deposit up. He would not necessarily have to [157] deduct the $20,000 from the profit that he makes from the hotel during the period of time he is in the premises. He doesn't have to make these improvements. Ordinarily, the

(Testimony of Lloyd S. Pettegrew.)

landlord makes them but in this particular lease he was to make them and the only reason it was set up on this basis was so that it didn't become a problem taxwise to the landlord. It is no problem to the tenant.

Further Examination

By the Court:

Lebenbaum's Exhibit A was prepared from the Miramar Hotel books. We sent an auditor up who audited the books and then prepared the statement. Leo Lebenbaum kept the books. We audited them. We inspected the payroll returns and the sales tax returns. This is an audited statement and it so states in the opening letter. We accepted the books as presented to us by Mr. Lebenbaum after we had checked them. We checked all of the entries, traced them back into the checkbook and all of those things. That is the basis of the preparation of our audit.

The Court: I think counsel are aware of the fact that the court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each would have received had the hotel been operated during those years under the lease. That is my ultimate aim. I know that is contrary to your theory, Mr. Burrill.

Mr. Burrill: Yes, your Honor. I concede that it is. [158]

The Court: How does that appeal to you, Mr. Hearn?

(Testimony of Lloyd S. Pettegrew.)

Mr. Hearn: If your Honor please, I will be frank to say that, if we could arrive at such a conclusion in this case and if, by that means, we could further arrive at a final judgment, and I mean a non-appealable judgment, then that would be quite satisfactory to me, but, if it does not so result, then I will reserve all rights of appeal on the theory that I have heretofore previously expressed.

(Certain arguments and statements between Court and counsel in reference to obtaining an independent witness omitted.)

Mr. Hearn: I believe, in view of Mr. Burrill's objections to the testimony of Mr. Pettegrew, I had better, for the time being, decline to enter into such a stipulation because, after all, I am very much afraid of an appeal by the defendants Gawzner from any judgment arrived at, based on testimony such as that which Mr. Pettegrew has given. And I, frankly, would have my serious doubts of the validity of such a judgment. And, if I am correct in so stating, then the expense of such an expert would be a loss. I do, however, state that, if we can arrive at a judgment based upon testimony such as Mr. Pettegrew has given, and if, by stipulation, that can result in a non-appealable judgment, and if such a judgment is, in my opinion, an equitable one and which at least fairly closely approximates that which Mr. Pettegrew's report suggests, then I will be willing to stipulate to the non-appealability of [159] the judgment.

(Testimony of Lloyd S. Pettegrew.)

The Court: In considering the question of the outside area not covered by the lease, I think I am bound to consider only the testimony that we have before us. You offered no evidence on that score, did you? You used the same experts, didn't you?

Mr. Hearn: No, your Honor; I not only didn't offer any evidence on it but I will state that I think the evidence offered by Mr. Burrill's witnesses was probably correct. The only thing I say is that in this proceeding the award made for the outside lands shouldn't be made in full when the award made for the land included in the lease is not made in full.

(Certain statements between Court and counsel omitted.)

The Court: Then, you have no further evidence to offer in that respect?

Mr. Hearn: No, your Honor; I don't believe I could produce a witness who would testify the rental value of the outside lands was any less than has already been testified to.

Mr. Burrill: If that is the case, if your Honor please, may we renew our motion to have an order from the court authorizing the withdrawal of $10,950, being the value testified to by Mr. Frisbie as to the land outside of the lease?

The Court: I don't think I will make any partial order. I will consider this entire matter.

I want this hearing continued. I will formulate something that I will advise you gentlemen about.

Further proceedings in the matter were had January 23, 1948, as follows:

It was agreed between counsel that the statement submitted by Mr. Burrill of the questions that had been reserved for decision by the Court were correct.

The Court: I believe at a hearing we had formerly I asked you gentlemen if you would be willing that another appraiser be selected by the court, one who was not connected with either side, and you were both of the opinion that wasn't necessary and it wouldn't avail us anything. I considered that for a while and finally decided to just take the matter on the record that has been established and consider all of the evidence in now that is going to be submitted. Is that your idea?

Mr. Burrill: Your Honor's statement is correct according to my understanding. Certainly, we declined, on behalf of the defendants Gawzner, to employ an additional witness or to have the court employ one. And I understand that Mr. Hearn had made the same statement.

Mr. Hearn: Yes; I so understand it, your Honor; that the matter is ready for submission.

The Court: So, then, we will consider the matter submitted at this time.

[Endorsed]: Filed Aug. 2, 1949. [161]